No. 91-1721-CFX
Status: GRANTED

Title: Northeastern Florida Chapter of the Associated General Contractors of America, Petitioner
v.
City of Jacksonville, Florida, et al.

Docketed:
April 27, 1992

Court: United States Court of Appeals for the Eleventh Circuit

Counsel for petitioner: Parker,G. Stephen

Counsel for respondent: Magid,Leonard S.

Entry	Date	Note	Proceedings and Orders
1	Apr 27 1992	G	Petition for writ of certiorari filed.
3	May 20 1992		Order extending time to file response to petition until June 27, 1992.
4	Jun 26 1992		Brief of respondent City of Jacksonville in opposition filed.
5	Jul 1 1992		DISTRIBUTED. September 28, 1992
6	Aug 3 1992	X	Supplemental brief of petitioner filed.
7	Oct 5 1992		Petition GRANTED.
			**********
8	Nov 17 1992		Brief amici curiae of Pacific Legal Foundation, et al. filed.
10	Nov 18 1992		Brief of petitioner filed.
13	Nov 18 1992	D	Motion of respondents to dismiss the case as moot filed.
14	Nov 18 1992		Brief amici curiae of Equal Rights Advocates, et al. filed.
9	Nov 19 1992		Brief amici curiae of Public Citizen, et al. filed.
12	Nov 19 1992		Brief amicus curiae of Associated General Contractors, Inc. filed.
15	Nov 30 1992		Opposition of petitioner to motion of respondents City of Jacksonville, et al. filed.
17	Dec 2 1992		Joint appendix filed.
16	Dec 3 1992		Record filed.
		*	Original proceedings U. S. Court of Appeals and U. S. District Court, Middle Dist. of Florida (Box)
18	Dec 14 1992		Motion of respondents to dismiss the case as moot DENIED.
20	Dec 14 1992		Order extending time to file brief of respondent on the merits until January 15, 1993.
21	Dec 28 1992		SET FOR ARGUMENT MONDAY, FEBRUARY 22, 1993. (3RD CASE).
22	Jan 15 1993		Brief of respondents City of Jacksonville, et al. filed.
23	Jan 15 1993		Brief amici curiae of Ohio and Michigan filed.
24	Jan 15 1993		Brief amici curiae of National League of Cities, et al. filed.
25	Jan 22 1993		CIRCULATED.
26	Feb 10 1993	X	Reply brief of petitioner filed.
27	Feb 22 1993		ARGUED.

91-1721

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No. ____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

NORTHEASTERN FLORIDA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA,

Petitioner,

v.

CITY OF JACKSONVILLE, FLORIDA and TOMMY HAZOURI, in his official capacity as Mayor of the City of Jacksonville,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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April 27, 1992

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QUESTION PRESENTED FOR REVIEW

Whether an association challenging a racially exclusive government ordinance may establish standing by showing that its members are precluded from bidding on certain municipal contracts, or whether the association must show that its members actually would have received one or more of those contracts absent the set-aside provisions?

LIST OF INTERESTED PARTIES

Only those parties listed in the caption were parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit. None of the parties has any parent companies or subsidiaries. Petitioner is affiliated with the Associated General Contractors of America, a non-profit corporation.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

LIST OF INTERESTED PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS & STATUTES . . . 3

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE WRIT 8

I. FEDERAL APPELLATE AND DISTRICT COURTS HAVE ESTABLISHED CONFLICTING RULES REGARDING STANDING TO CHALLENGE RACE-CONSCIOUS PROGRAMS. 9

A. At Least Seven Federal Courts Have Found That Simply Being Precluded from the Competitive Process Is Sufficient Injury To Create Standing To Sue. 10

B. The Eleventh Circuit Court of Appeals and Five Other Courts Require Identification of Specific Contracts Lost Due to a Race-Conscious Program. 16

II. REQUIRING THAT A PLAINTIFF BE ABLE TO IDENTIFY A SPECIFIC CONTRACT LOST DUE TO A RACE-CONSCIOUS PROGRAM CONTRADICTS THE PRECEDENT OF THIS COURT. 20

CONCLUSION 27

TABLE OF AUTHORITIES

Cases

Allen v. Wright, 468 U.S. 737 (1984) 9

Associated General Contractors of California, Inc. v. Coalition for Economic Equity, 950 F.2d 1401 (9th Cir. 1991), *pet. cert. filed*, 60 U.S.L.W. 3617 (Feb. 18, 1992) 14

Associated General Contractors of Connecticut, Inc. v. City of New Haven, 130 F.R.D. 4 (D. Conn. 1990) . 12

Bryant v. Yellen, 447 U.S. 352 (1980) 21

CACI, Inc.-Federal v. United States, 719 F.2d 1567 (Fed. Cir. 1983) 14

Capeletti Brothers, Inc. v. Broward County, 738 F.Supp. 1415 (S.D. Fla. 1990), *aff'd*, 931 F.2d 903 (11th Cir.), *cert. denied*, __ U.S. __, 111 S.Ct. 2871 (1991) 17

Carpenter v. Barnhart, 894 F.2d 401 (4th Cir. 1990) 18

City of Richmond v. J.A. Croson Co.,
488 U.S. 469 (1989) 7, 8

Cone Corp. v. Fla. Dept. of Transportation,
921 F.2d 1190 (11th Cir.), cert. denied, __ U.S. __,
111 S.Ct. 2238 (1991) 17

Contractors' Ass'n of Eastern Pennsylvania, Inc.
v. City of Philadelphia, 735 F.Supp. 1274
(E.D. Pa. 1990), *aff'd in relevant part*,
945 F.2d 1260 (3d Cir. 1991) 18

Contractors' Ass'n of Eastern Pennsylvania, Inc.
v. City of Philadelphia,
945 F.2d 1260 (3d Cir. 1991) 18

Coral Construction Co. v. King County, 941 F.2d 910
(9th Cir. 1991), *cert. denied*, __ U.S. __,
112 S.Ct. 875 (1992) 13

Daley's Dump Truck Service, Inc. v. Kiewit Pacific Co.,
759 F. Supp. 1498 (W.D. Wash. 1991) 19

Gladstone Realtors v. Village of Bellwood,
441 U.S. 91 (1979) 11

Heckler v. Mathews, 465 U.S. 728 (1984) 21, 22

Hunt v. Washington State Apple Advertising Comm'n,
432 U.S. 333 (1977) 9

International Brotherhood of Teamsters
v. United States, 431 U.S. 324 (1977) 23

Jacksonville Branch, NAACP v. Duval Co. School Bd.,
883 F.2d 945 (11th Cir. 1989) 25

Maryland Highways Contractors Ass'n v. State
of Maryland, 933 F.2d 1246 (4th Cir.),
cert. denied, __ U.S. __, 112 S.Ct. 373 (1991) . . . 17, 25

Michigan Road Builders Ass'n, Inc. v. Blanchard,
761 F. Supp. 1303 (W.D. Mich. 1991) 19

National Bleck Media Coalition v. F.C.C.,
791 F.2d 1016 (2d Cir. 1986) 15

Northeastern Fla. Chapter v. City of Jacksonville,
896 F.2d 1283 (11th Cir. 1990) 6

Northeastern Florida Chapter v. City of Jacksonville,
951 F.2d 1217 (11th Cir. 1992) 7, 9, 17

O'Donnell Construction Co. v. District of Columbia,
762 F.Supp. 354 (D.D.C. 1991) 12

Orr v. Orr, 440 U.S. 268 (1979) 21

Pennell v. City of San Jose, __ U.S. __,
108 S.Ct. 849 (1988) 23

Podberesky v. Kirwan, 764 F. Supp. 364 (D. Md. 1991),
rev'd, 956 F.2d 52 (9th Cir. 1992) 25

Regents of California v. Bakke,
438 U.S. 265 (1978) 22, 23

S.J. Groves & Sons Co. v. Fulton Co.,
920 F.2d 752 (11th Cir.), *cert. denied*, __ U.S. __,
111 S.Ct. 2274 (1991) 16

Underground Contractors' Ass'n v. Metropolitan Water Reclamation District of Greater Chicago,
No. 90-C-3586 (N.D. Ill. 1991) 19

United Fence & Guard Rail Corp. v. Cuomo,
No. 88-CV-306 (N.D.N.Y Oct. 1, 1991)
(1991 Westlaw 197675) 13

Village of Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977) 20

Warth v. Seldin, 422 U.S. 490 (1975) 11, 16

West Virginia Ass'n of Community Health Centers v. Heckler, 734 F.2d 1570 (D.C. Cir. 1984) 14

Statutes

Jacksonville Purchasing Code
§ 126.601, *et seq.* 5, 6, 11

IN THE

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OCTOBER TERM, 1991

NORTHEASTERN FLORIDA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA,

Petitioner,

v.

CITY OF JACKSONVILLE, FLORIDA and TOMMY HAZOURI, in his official capacity as Mayor of the City of Jacksonville,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner Northeastern Florida Chapter of the Associated General Contractors of America respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled proceeding on January 28, 1992.

OPINIONS BELOW

The Eleventh Circuit's opinion is reported at 951 F.2d 1217 (11th Cir. 1992), and is reproduced in the Appendix to this petition at App. 1. The district court's judgment and opinion is not reported, but is reproduced in the Appendix to this petition at App. 7.

JURISDICTION

Petitioner brought this action in the United States District Court for the Middle District of Florida pursuant to 42 U.S.C. § 1983. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291, and entered its judgment on January 28, 1992. *See* 951 F.2d 1217 and *infra*, p. App. 1.

Petitioner timely filed the instant petition for writ of certiorari in accordance with Rule 13 of the Rules of this Court. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const., Amend. XIV, Sec. 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 Civil Action for Deprivation of Rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

City of Jacksonville, Fla. Purchasing Code §§ 126.601-126.611 (1984), *as amended* (1988).

The relevant ordinances are lengthy and, pursuant to Rule 14 of the Rules of this Court, are set out in the appendix at p. App. 14.

STATEMENT OF THE CASE

Petitioner, Northeastern Florida Chapter of the Associated General Contractors of America [hereinafter "AGC"], is an association of persons and firms in the construction industry doing business in Jacksonville and Duval County, Florida. Petitioner brought this suit on April 4, 1989, pursuant to 42 U.S.C. § 1983, challenging, both facially and as applied, the Minority Business Enterprise Programs administered by the City of Jacksonville [hereinafter "the City"][1].

The City Minority Business Enterprise ["MBE"] program requires that ten percent of the amount budgeted city contracts be set aside for firms characterized as MBE's. Jacksonville Purchasing Code ["City Code"] § 126.604 (capital improvements contracts), § 126.605 (other contracts); *infra* pp. App. 15-21. The program, as amended, defines a minority business as one owned at least 51% by a minority group member or a woman. City Code § 126.603(a), *infra* p. App. 15. The term "minority group member" refers to a person who is or considers himself or herself to be, black, Spanish-speaking American, Oriental, Indian, Eskimo, Aleut, or handicapped. City Code § 126.603(b), *infra* p. App. 15.

The city's chief purchasing officer earmarks contracts

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[1] AGC also named as defendants the Duval County School Board and its Chairman. After the district court enjoined enforcement of the programs, the school board suspended its programs and has not been a party to any of the subsequent proceedings.

for bidding by MBE's. The ordinance specifies that the amount of the set-aside, with the Mayor's approval "shall be deemed reserved for minority business enterprises only, and the projects shall be awarded directly to minority business enterprises." City Code § 126.604(c), *infra* p. App. 18; § 126.605(c), *infra* p. App. 21.

AGC's members are primarily non-minorities within the meaning of the challenged programs. With the exception of those members who are women, handicapped, or members of one of the defined racial groups, AGC's members are unable to compete for the contracts that are set aside for MBE firms pursuant to the City's program. During the almost five years that the program was in effect, until the district court enjoined its operation, the City contracts awarded to minority businesses on the basis of race, and from which nonminority AGC members have been excluded, amounted to approximately $14,625,000.00.

On the same day as it filed suit, April 4, 1989, AGC moved for a temporary restraining order and a preliminary injunction. On April 6, 1989, the district court entered a temporary restraining order prohibiting future implementation of the challenged MBE ordinance. After a hearing, the district court on April 20, 1989, granted a preliminary injunction.

The City appealed the district court's order, and the Eleventh Circuit Court of Appeals reversed. *Northeastern Fla. Chapter v. City of Jacksonville*, 896 F.2d 1283 (11th Cir. 1990). The appellate court did not rule on the issue of standing, although Chief Judge Tjoflat stated in a concurring opinion his view that AGC lacked standing to bring suit. The Eleventh Circuit issued its order on March 2, 1990, and the

mandate issued on April 6, 1990.

During the year between the district court's grant of the preliminary injunction and the Eleventh Circuit's reversal of that injunction, the parties continued to pursue this case. On June 10, 1989, the City filed a motion for judgment on the pleadings, or in the alternative, summary judgment. AGC responded to that motion, and filed a cross-motion for summary judgment on October 20, 1989.

After the Eleventh Circuit issued its opinion in the first appeal, and before trial, the district court on May 31, 1990, granted the plaintiff's motion for summary judgment and denied the defendants' motion. The district court found that the City's program failed to meet the criteria that this Court established in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). After the trial court granted AGC's motion for attorneys' fees, the City appealed once again.

The Eleventh Circuit Court of Appeals did not reach the merits of the City's program, but ordered the case dismissed without prejudice for lack of standing. *Northeastern Florida Chapter v. City of Jacksonville*, 951 F.2d 1217 (11th Cir. 1992). The court held that AGC lacked standing because it had not shown "that, but for the [MBE] program, any AGC member would have bid successfully for any of [the City's] contracts." *Id.* at 1219; *infra*, p. App. 4.

REASONS FOR GRANTING THE WRIT

In the three years since this Court decided *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), establishing clear guidelines for evaluating race-conscious programs, federal courts have seen a virtual explosion of activity in this area. Unfortunately, some municipalities have attempted to evade, rather than follow, this Court's guidelines. Many plaintiffs attempting to challenge those municipalities have been unable to obtain federal court review because of strict tests for determining standing.

Standing has become a serious issue in affirmative action cases. Of the numerous such cases since *J.A. Croson Co.*, approximately twenty-two have involved minority preferences or set-asides in government contracts. Of those twenty-two cases, fourteen--more than 63%--have addressed the issue of standing. The Eleventh Circuit Court of Appeals, along with at least five other federal courts, has established requirements for standing that make it extremely difficult, if not impossible, for a non-minority contractor to obtain the requisite strict scrutiny of a race-conscious program. Those standards conflict with both the law of other federal courts and the precedent of this Court, whose cases hold that loss of an opportunity to *compete* for contracts is sufficient injury to confer standing.

I. FEDERAL APPELLATE AND DISTRICT COURTS HAVE ESTABLISHED CONFLICTING RULES REGARDING STANDING TO CHALLENGE RACE-CONSCIOUS PROGRAMS.

An association has standing to bring suit whenever (1) one or more of its members would have standing; (2) the interests it seeks to protect are germane to its purposes; and (3) neither the claim nor the relief requested requires participation of individual members in the lawsuit. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). In this case, the Eleventh Circuit ruled against AGC only because it found that none of its members would have standing.

To establish standing, an individual plaintiff must allege sufficient facts in its complaint, and produce sufficient evidence in discovery or trial of the case, to show that: (1) he has suffered some actual or threatened injury; (2) fairly traceable to the ordinance; and (3) likely to be redressed by the relief he seeks. *Allen v. Wright*, 468 U.S. 737, 751 (1984). In the instant case, the Eleventh Circuit found that AGC failed to meet the first requirement of concrete, specific injury. *Northeastern Florida Chapter*, 951 F.2d at 1219-20; *infra*, pp. App. 4-5. This holding conflicts with the decisions of other circuit and district courts that have found complaints similar to Petitioner's to be sufficiently specific to establish standing.

A. At Least Seven Federal Courts Have Found That Simply Being Precluded from the Competitive Process Is Sufficient Injury To Create Standing To Sue.

Petitioner AGC filed a verified complaint, alleging *inter alia*, that it is

> a trade association which has membership comprised of, *inter alia*, 240 general contractors, subcontractors, suppliers and associates, many of whom regularly bid on and perform construction work for the City of Jacksonville and Duval County. . . . [S]uch members of Plaintiff AGC are expressly excluded from bidding on construction contracts set aside by the City of Jacksonville or the Duval County School Board.
>
> * * *
>
> Under the Jacksonville MBE program ten percent of the total amount appropriated for capital improvements during the fiscal year is set aside for minority business enterprises.
>
> * * *
>
> The Defendants, acting pursuant to the provisions of the Ordinance 83-1200-647 and Subchapter 13, have set aside construction and procurement contracts and have restricted bidding on and awarding of such contracts to only MBEs.
>
> Numerous non-minority members of AGC would have been eligible to, and would have, bid on such designated set aside contracts but for the restrictions imposed on such contracts by the Defendants pursuant to Ordinance 83-1200-647 and Subchapter 13.

Plaintiff's Complaint for Declaratory and Injunctive Relief, ¶¶ 9, 19, 45, 46. Defendants challenged none of these allegations, and the district court accepted them as settled. *See, e.g., infra*, p. App. 7-8. Petitioner also placed into the record a copy of the city ordinance that sets aside ten percent of all other city contracts. City Code § 126.605(c); *infra*, p. App. 21.

When, as here, standing must be decided largely on the pleadings,[2] the Court must "accept as true all material allegations of the complaint, and . . . construe the complaint in favor of the complaining party." *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 109 (1979), *quoting Warth v. Seldin*, 422 U.S. 490, 501 (1975). So construed, Petitioner's complaint establishes that its non-minority members, otherwise eligible to compete for contracts with the City of Jacksonville, are excluded solely because of their race from bidding for ten percent of city contracts.

Those facts certainly would be sufficient in the U.S.

[2] Respondents never challenged petitioner's standing until the second appeal of this case, long after the district court had granted summary judgment in petitioner's favor. Because the issue was never raised in the trial court, the record does not contain any evidence of standing beyond the allegations in the verified complaint. Petitioner requested that the Eleventh Circuit, because of the posture of the case, remand it for further evidentiary findings, but the appellate court opted instead to order the case dismissed without prejudice.

Court of Appeals for the Ninth Circuit Court and the United States District Courts for the District of Columbia, Connecticut, and the Northern District of New York. Furthermore, the case law of the Federal Circuit and the U.S. Courts of Appeals for the District of Columbia and Second Circuits indicates that, although those courts have not considered this specific issue, they would find AGC's complaint sufficient to establish its standing.

The earliest of the cases on this issue is *Associated General Contractors of Connecticut, Inc. v. City of New Haven*, 130 F.R.D. 4 (D. Conn. 1990). The plaintiff trade association challenged an ordinance that set aside a certain percent of public works for minority- and women-owned firms. Although there was no evidence that any association member had lost a specific contract because of the ordinance, the court found that the association had standing. "[T]he set-aside ordinance deprives AGC's white male subcontractor and supplier members of the opportunity to compete for a percentage of the contracts awarded by defendant." *Id.* at 7.

A similar case is *O'Donnell Construction Co. v. District of Columbia*, 762 F.Supp. 354 (D.D.C. 1991). A white-owned contracting company challenged two minority set-aside programs and sought a preliminary injunction. Although the plaintiff identified no specific contract lost due to the programs, it did allege that it had been "excluded from the public contracting opportunities." *Id.* at 362. The court found the complaint sufficient to establish standing to seek a preliminary injunction. "These allegations demonstrate that the injury complained of in this action constitutes the lost opportunity to bid on contracts which are reserved for the

District's MBE program." *Id.*

The most recent case on this issue is *United Fence & Guard Rail Corp. v. Cuomo*, No. 88-CV-306 (N.D.N.Y Oct. 1, 1991) (1991 Westlaw 197675). The plaintiff corporation challenged a state Department of Transportation affirmative action program. The state argued, *inter alia*, that the corporation did not have standing because it failed to show that it had been denied a subcontract because of the program. The district court disagreed, noting that the plaintiff had submitted evidence of its history of bidding for DOT contracts and its intention of continuing to do so. The plaintiff also had evidence of at least one subcontract that it had been denied because of the general contractor's belief that it would not otherwise meet the program's MBE requirements. The court found that evidence sufficient to confer standing. *Id.*

The U.S. Court of Appeals for the Ninth Circuit placed its seal of approval on this principle for determining standing in *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991), *cert. denied*, __ U.S. __, 112 S.Ct. 875 (1992). Once again a construction company challenged a county's minority and women business enterprise program. In the course of holding the ordinance unconstitutional, the court considered the plaintiff's standing to challenge the women-owned business enterprise ["WBE"] preference program. *Id.* at 928. Noting that Coral Construction had not pointed to a specific contract it had lost to a WBE, the court nevertheless held that the company had standing to challenge the ordinance. "As a result of the objectively unequal bidding process under the preference method of awarding contracts, an injury results not only when Coral Construction actually loses a bid, but

every time the company simply places a bid." *Id.* at 930. *See also, Associated General Contractors of California, Inc. v. Coalition for Economic Equity*, 950 F.2d 1401 (9th Cir. 1991) (association had standing to challenge bid preference ordinance), *pet. cert. filed*, 60 U.S.L.W. 3617 (Feb. 18, 1992).

At least three other circuits, in cases not involving MBE contract set-asides, have held that a change in the opportunity to compete can by itself be sufficient injury to confer standing. In *West Virginia Ass'n of Community Health Centers v. Heckler*, 734 F.2d 1570 (D.C. Cir. 1984), the plaintiff association sued the Secretary of Health and Human Services, alleging that the formula the Secretary was using to grant funds unlawfully deprived the State of West Virginia of money to which it was entitled. The federal government argued that the association did not have standing, because it had not shown that if the court mandated in increase in the state's share of the federal funds, any of its members would benefit. The court agreed with the health centers' contention that they had standing because they "have been injured by being denied an opportunity to compete for this increased funding, and that to have standing they need not demonstrate that they would actually receive the additional funding." *Id.* at 1574.

The Federal Circuit followed similar reasoning in *CACI, Inc.-Federal v. United States*, 719 F.2d 1567 (Fed. Cir. 1983). An unsuccessful bidder on a government contract sought an injunction of the award of the contract, alleging that the federal officials who helped award the contract had a business relationship with the successful bidder that created a conflict of interest. The government argued that the plaintiff,

as an unsuccessful bidder, had no standing to challenge the award of the contract. The court disagreed, noting that the injury that the plaintiff alleged was not the lost contract but "the government's breach of its implied contract to deal fairly with all bidders [which] denied CACI the opportunity to have its bid considered solely on its merits." *Id.* at 1575. With that allegation, the plaintiff had established sufficient injury to have standing to sue.

The Second Circuit followed similar reasoning, although on the flip side of the question, in *National Black Media Coalition v. F.C.C.*, 791 F.2d 1016 (2d Cir. 1986). The plaintiff, a nonprofit organization seeking to promote access by blacks to mass media, sought review of an FCC decision to abandon its minority preference policy. The court found that the organization had statutory standing (thus assuming Article III standing) because the FCC rules would affect the ability of the organization's members to obtain broadcast licenses. *Id.* at 1021. The organization did not, and apparently did not need to, show that any member had actually been refused a license because of the new FCC policy. The change in the rules for competing for the licenses was sufficient injury.

Thus, none of these seven courts would require AGC or any other plaintiff to identify a specific contract lost because of a race-conscious program in order to have standing to challenge that program. The inability to compete for contracts is sufficient injury under the Equal Protection Clause.

B. The Eleventh Circuit Court of Appeals and Five Other Courts Require Identification of Specific Contracts Lost Due to a Race-Conscious Program.

In contrast to the above seven courts stand the Eleventh Circuit and five other federal courts, holding that lost opportunity to compete for a contract is not sufficient injury for standing. Rather, this latter group of courts requires that a plaintiff identify specific contracts that but for the program's restrictions, would have been awarded to the plaintiff.

The Eleventh Circuit's line of cases on this issue began with a trio handed down in 1991 (between the first and second appeals of the instant case)[3]. *See S.J. Groves & Sons Co. v. Fulton Co.*, 920 F.2d 752 (11th Cir.), *cert. denied*, __ U.S. __, 111 S.Ct. 2274 (1991); *Cone Corp. v. Fla. Dept. of Transportation*, 921 F.2d 1190 (11th Cir.), cert. denied, __ U.S. __, 111 S.Ct. 2238 (1991); *Capeletti Brothers, Inc. v. Broward County*, 738 F.Supp. 1415 (S.D. Fla. 1990), *aff'd*, 931 F.2d 903 (11th Cir.), *cert. denied*, __ U.S. __, 111 S.Ct. 2871 (1991). Although the facts in those cases vary, the test for standing is the same -- a mechanical, bright-line requirement that the plaintiff allege a "specific contract lost on account of race." *Northeastern Florida Chapter*, 951 F.2d at 1219.

That strict test has been adopted by the U.S. Courts of Appeals for the Third and Fourth Circuits, and the U.S. District Courts for the Western District of Washington, the Western District of Michigan, and the Northern District of Illinois.

The Fourth Circuit expressed its rule in two decisions. The plaintiff in *Maryland Highways Contractors Ass'n v. State of Maryland*, 933 F.2d 1246 (4th Cir.), *cert. denied*, __ U.S. __, 112 S.Ct. 373 (1991), challenged a state MBE set-aside statute. The court held that the association lacked standing because it had not established injury to any of its members. The plaintiff "admitted that: (1) it had no information concerning any member who may have lost a bid or contract or lost profits as a result of the MBE statute; (2) it had conducted no studies to ascertain whether members had been so injured; and (3) it possessed no documents relating to members' lost profits." *Id.* at 1251.

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[3] The Eleventh Circuit ignored the prevailing law not only on the merits of the standing issue, but also on the procedure to be followed in determining standing. In *Warth v. Seldin*, this Court noted that the trial court has the power to allow a plaintiff to supply evidence supporting standing. "If, after this opportunity, the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed." *Id.* at 2207. Even the other courts that require evidence of a particular lost contract dismissed the cases before them only after either a trial or hearing on the issue or discovery.

The Eleventh Circuit, by contrast, did not allow any such evidence. The first mention of the standing issue in the instant case was in a concurring opinion in the first appeal, rendered after the record was closed and the parties had filed motions for summary judgment. The law of the Circuit did not change until after the district court had ruled on those motions for summary judgment, but before the second appeal. Despite that posture of the case, and the fact that AGC had had no opportunity to present evidence on the issue, the Eleventh Circuit refused to remand the case. Rather, it ordered the case dismissed without prejudice.

In an earlier, unpublished opinion, the Fourth Circuit dismissed for lack of standing a suit in which a landscaping contractor and his firm challenged a disadvantaged business enterprise ["DBE"] program. *Carpenter v. Barnhart*, 894 F.2d 401 (4th Cir. 1990) (Table) (Text in slip op. No. 88-3578 and Westlaw). The court held that the plaintiffs had failed to show any injury caused by the DBE program. "Carpenter had not even regularly bid on North Carolina highway construction projects since 1983 or 1984, and never identified any specific contracts that were denied him due to the DBE program." *Id.*, Westlaw text p.4. Without such evidence, the plaintiff had no standing to sue.

The Third Circuit approved this evidentiary requirement in *Contractors' Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 945 F.2d 1260 (3d Cir. 1991). The appellate court approved the district court's decision that several plaintiff associations had standing to challenge a set-aside program for minority, female, and handicapped business enterprises. *Id.* at 1264.

The district court, although holding that four plaintiffs did have standing, decided that five other associations had failed to establish sufficient injury to themselves or their members. The four plaintiffs who did have standing were able to identify projects that, but for the ordinance, they would have been awarded. *Contractors' Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 735 F.Supp. 1274, 1283 n.3 (E.D. Pa. 1990), *aff'd in relevant part*, 945 F.2d 1260 (3d Cir. 1991). The other associations either presented no evidence, or only provided affidavits from their members stating that they generally bid on the types of projects covered by the

ordinance. *Id.* at 1284.

Three district court cases have followed the same line of reasoning. *See Daley's Dump Truck Service, Inc. v. Kiewit Pacific Co.*, 759 F. Supp. 1498, 1502 (W.D. Wash. 1991) (to have standing, plaintiffs "must allege that they would have bid for and received some or all of the work given by defendants"); *Michigan Road Builders Ass'n, Inc. v. Blanchard*, 761 F. Supp. 1303, 1310-11 (W.D. Mich. 1991) (association lacked standing where no evidence that members actually bid on reserved projects); *Underground Contractors' Ass'n v. Metropolitan Water Reclamation District of Greater Chicago*, No. 90-C-3586 (N.D. Ill. 1991) (1991 Westlaw 127616) (contractors challenging minority set-aside programs must allege that they were denied contracts for specific projects).

All of these courts have adopted the same formula -- a plaintiff contractor challenging a MBE ordinance must show an economic injury. These courts no longer recognize the type of injuries traditionally involved in equal protection cases, such as the harm inherent in being excluded from a program regardless of whether that program would have been of economic benefit. This formula has the virtue of clarity, but it ignores the prior decisions of this Court.

II. REQUIRING THAT A PLAINTIFF BE ABLE TO IDENTIFY A SPECIFIC CONTRACT LOST DUE TO A RACE-CONSCIOUS PROGRAM CONTRADICTS THE PRECEDENT OF THIS COURT.

The mechanical rule applied to this case by the Eleventh Circuit and approved by other federal courts not only creates a conflict among the courts, but it also contradicts clear decisions by this Court. This Court has determined on numerous occasions that in order to have standing a plaintiff need not prove that he or she would have obtained a job, scholarship, or other benefit. The mere loss of the opportunity to compete creates a cognizable injury under the equal protection clause of the U.S. Constitution.

This Court has on several occasions considered challenges to absolute barriers to participation in government programs. The Court consistently has allowed such challenges, even absent evidence that the plaintiff actually would benefit from participation in the program.

In *Village of Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (1977), the plaintiff was a developer that had contracted to purchase a tract of land in order to build racially integrated housing. The developer challenged zoning ordinances that effectively precluded such housing. The defendants challenged the developer's standing to bring suit. *Id.*, 429 U.S. at 260. The Court found that the uncertainty regarding whether the developer would in fact be able to build the housing did not preclude standing in federal court. While the injunction that the developer sought would not guarantee that the company could build the housing, the board's zoning

decision stood

> as an absolute barrier to constructing the housing MHDC [the developer] had contracted to place on the Viatorian site. If MHDC secures the injunctive relief it seeks, that barrier will be removed. . . . MHDC has shown an injury to itself that is "likely to be redressed by a favorable decision."

Village of Arlington Heights, 429 U.S. at 261-62 (citation omitted). *See also*, *Bryant v. Yellen*, 447 U.S. 352, 368 (1980) (intervenors had standing where application of statute would increase likelihood of intervenors' being able to buy affected land); *Orr v. Orr*, 440 U.S. 268 (1979) (male plaintiff had standing to challenge Alabama law requiring husbands, but not wives, to pay alimony); *Heckler v. Mathews*, 465 U.S. 728, 739 (1984) ("the right to equal treatment guaranteed by the Constitution is not coextensive with any substantive right to the benefits denied to the party discriminated against").

These cases stand for the proposition that an absolute barrier to participation in a government program creates sufficient injury for persons impacted by that barrier. Similarly, when a non-minority contractor faces an absolute bar to receiving a given percentage of public contracts, he or she suffers sufficient injury to have standing to challenge that barrier.

Absolute barriers to participation have special status in equal protection jurisprudence. The essence of the Equal Protection Clause is that all similarly situated persons should have equal opportunity to participate in democratic government, whether or not they all receive equal benefits from that participation. "[D]iscrimination itself by

perpetuating "archaic and stereotypic" notions . . . can cause serious noneconomic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group." *Heckler v. Mathews* at 739-40 (citation omitted).

This Court recognized the importance of equal competition, regardless of the likelihood of success, in *Regents of California v. Bakke*, 438 U.S. 265 (1978). The plaintiff in that case was a white male whose application to a state medical school was rejected. He challenged the legality of the school's special admissions program under which 16 of 100 positions in the class were reserved for minority students, several of whom were admitted with qualifications that were lower than his. Although the issue of standing was not raised in the trial court or court of appeals, several *amici* suggested in their briefs that Bakke lacked standing. *Id.*, 438 U.S. at 281, n.14. They argued that he had not shown that his injury, exclusion from medical school, would be redressed by a favorable decision. The Court stated,

> even if Bakke had been unable to prove that he would have been admitted in the absence of the special program, it would not follow that he lacked standing. The constitutional element of standing is plaintiff's demonstration of any injury to himself that is likely to be redressed by favorable decision of his claim. The trial court found such an injury, apart from failure to be admitted, *in the University's decision not to permit Bakke to compete for all 100 places in the class, simply because of his race.* Hence

> the constitutional requirements of Art. III were met. The question of Bakke's admission *vel non* is merely one of relief.

Bakke, 438 U.S. at 281, n.14 (citations omitted, emphasis added). *See also*, *Pennell v. City of San Jose*, __ U.S. __, 108 S.Ct. 849, 855 (1988) (plaintiff association had standing where complaint alleged that ordinance would be enforced against members, thereby reducing rent).

When persons are excluded from participation in a government program, then, the issue is not whether they can show that they would have benefitted from participation, but the fact that they were excluded in the first place. Like Bakke, the nonminority AGC contractors have been injured by the City's failure to permit them to compete for all 100% of available City contracts.

In the final analysis, the issue of whether any AGC members lost profits or were otherwise harmed in their business due to the Jacksonville ordinance "is merely one of relief." *Bakke*, 438 U.S. at 281, n.14. The relief that AGC seeks is not damages or recovery of lost profits or any other monetary value. Rather, it simply requests an injunction requiring the City to grant its members equal status in bidding for *all* City contracts, not only some of them.

The injury that AGC alleges is not in the loss of a particular contract, but in the exclusion of non-minority members from full participation in bidding for those contracts in the first place. Any other standard ignores the reality of race-based exclusions and the bidding process for government contracts.

This Court recognized that reality in *International*

Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977).

In that Title VII case, the Court considered the defendant's assertion that a person who had not actually applied for a job could never be awarded seniority as a remedy. The Court disagreed, stating:

> The effects of and *the injuries suffered* from discriminatory employment are not always confined to those who were expressly denied a requested employment opportunity. . . If an employer should announce his policy of discrimination by a sign reading "Whites Only" on the hiring-office door, his victims would not be limited to the few who ignored the sign and subjected themselves to personal rebuffs. . . . When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application.

Id. at 365-66 (emphasis added).

A contractor faces more than "personal rebuffs" in bidding for a municipal contract reserved for a particular racial group. Preparing bids, particularly for large projects, can be expensive both in terms of time and resources. Bidding for a contract on which a city has placed a label reading "Minorities Only" is not only a futile gesture, but an expensive one.

Requiring that a contractor actually bid for a project, and submit the lowest acceptable bid, also creates a double standard for post-*Croson* cases. Independent contractors are held to a more stringent test than employees or medical school

applicants.

This double standard can be seen clearly in the Fourth Circuit. In *Podberesky v. Kirwan*, 764 F. Supp. 364 (D. Md. 1991), *rev'd*, 956 F.2d 52 (9th Cir. 1992), a Hispanic student challenged a university's scholarship program reserved for black students. The court upheld the program, determining in the course of its decision that the student, who was no longer eligible for a scholarship, had standing. "Denial of an equal opportunity for consideration for a benefit or privilege can give rise to an injury conferring standing. . . . Here, Podberesky unquestionably was denied an equal opportunity to compete for a Banneker scholarship, solely because of his race." *Id.*, 764 F. Supp. at 367-68.

On appeal, the Fourth Circuit held that the program could not withstand equal protection analysis absent evidence of present effects of past discrimination. *Id.*, 956 F.2d 52. Although the court did not address the issue of standing, it had to agree with the district court on that issue in order to reach the merits of the case. Yet this court that allowed a student to challenge a scholarship program for which he was not eligible was the same court that denied contractors standing to challenge a minority set-aside program because they had not identified a contract lost because of the program. *Maryland Highways Contractors Ass'n*, 933 F.2d at 1251.

The Fourth Circuit is only the most obvious example of the disparate tests used to determine standing. *Cf.*, *Jacksonville Branch, NAACP v. Duval Co. School Bd.*, 883 F.2d 945, 953 n.4 (11th Cir. 1989) (association had standing to allege school violated equal protection clause even though no members who testified at trial had children enrolled in

challenged programs). The gulf between the various tests, and between the law of this Court and that of lower courts, can only grow larger as more affirmative action cases arise.

The district court in this case specifically found the Jacksonville, Florida program to be unconstitutional. Yet, because of a stringent mechanical test for standing, applied after two years of proceedings in the trial court and one trip to the appeals court, the program remains in place. Until this Court states whether its rule decided in *Bakke* and other cases applies to *J.A. Croson Co.* and its progeny, unconstitutional race-conscious programs will remain in place in Jacksonville and other municipalities throughout the country.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests that this Court grant the instant petition for a writ of certiorari and that this matter be heard by the full Court.

Respectfully submitted,

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April 27, 1992

APPENDIX

Opinion of the Court of Appeals for the
Eleventh Circuit, January 28, 1992 . . . . . App. 1

Order of the District Court,
May 31, 1990 . . . . . App. 7

City of Jacksonville, Florida, Purchasing
Code, §§ 126.601, *et seq.* . . . . . App. 14

NORTHEASTERN FLORIDA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, a Florida Corporation not for profit, Plaintiff-Appellee,

v.

CITY OF JACKSONVILLE, FLORIDA, a Florida Municipal Corp., Tommy Hazouri, in his official capacity as Mayor of the City of Jacksonville, Defendants-Appellants.

No. 90-3495.

United States Court of Appeals, Eleventh Circuit

Jan. 28, 1992.

Appeal from the United States District Court for the Middle District of Florida.

Before TJOFLAT, Chief Judge, BIRCH, Circuit Judge, and GODBOLD, Senior Circuit Judge.

GODBOLD, Senior Circuit Judge:

The Northeastern Florida Chapter of the Associated General Contractors of America (AGC) sued, challenging Jacksonville, Florida's contract set-aside program for minority business enterprises (MBEs). AGC, an association of individuals and firms in the construction industry who do

business in Jacksonville and are primarily non-minorities for purposes of the set-aside program, filed a 42 U.S.C §§ 1981 and 1983 complaint alleging that the city's program violated the Equal Protection Clause of the Fourteenth Amendment. The city and its mayor were named as defendants. Plaintiff sought declaratory and injunctive relief against enforcement of the ordinance establishing the set-aside program.

The district court granted a preliminary injunction. On appeal this court reversed, holding:

> The present record is inadequate--especially on irreparable injury--to warrant the extraordinary remedy of preliminary injunction.

Northeastern Florida Chapter v. Jacksonville, Florida, 896 F.2d 1283, 1286 (11th Cir. 1990). Chief Judge Tjoflat specially concurred. He agreed with the court that the plaintiff had not made a showing of irreparable injury sufficient to support injunctive relief. But he expressed his view that the decision should have been based on the ground that the plaintiff association lacked standing because it had failed to allege with particularity that its members suffered actual or threatened injury.

Meanwhile the city had filed a motion for judgment on the pleadings or summary judgment, and AGC filed a cross-motion for summary judgment. AGC filed no additional material but relied upon the record that had been presented to this court on appeal. The court granted AGC's motion and entered a permanent injunction on the ground that the city's MBE program suffers from the same constitutional infirmities that the Supreme Court, in *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989), found in

the Richmond, Virginia plan. The court did not address the question of whether the record was sufficient, nor did it address the matter of standing discussed in Chief Judge Tjoflat's special concurrence. The city appeals from this judgment.

The case has now been decided on the merits. We are squarely presented with the issue of standing.[1]

We do not reach the merits of the City's appeal because we find that AGC lacks standing to challenge the ordinance establishing the set-aside program and therefore dismiss the case. In determining whether the court has jurisdiction to entertain AGC's suit, we review the district court's judgment *de novo. Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater*, 777 F.2d 598, 607 n. 24 (11th Cir. 1985), *cert. denied*, 476 U.S. 1116, 106 S.Ct. 1973, 90 L.Ed.2d 656 (1986).

Jacksonville enacted Ordinance No. 83-1200-647, codified at §§ 126.601-126.611 of Jacksonville, Fla. Purchasing Code (1984) and entitled "Minority Business Enterprise Participation," which provides for affirmative action in the award of city contracts. The ordinance set aside for award to MBEs ten percent of the amount allocated to city

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[1] We are not barred by law of the case principles. The decision in the first appeal did not rule on standing, either expressly or impliedly. Instead, with notice that Chief Judge Tjoflat would base the decision on that ground, it pretermitted the issue. Moreover, after the decision, principles relating to standing in a similar case were addressed and decided by this court in *Cone Corp. v. Fla. Dept. of Transportation*, 921 F.2d 1190 (11th Cir.), *cert. denied*, __U.S__, 111 S.Ct 2238, 114 L.Ed.2d 479 (1991).

capital improvement contracts and contracts for goods and services. MBEs awarded contracts pursuant to the ordinance are in turn expected to award 50% of their subcontracting business to MBEs. Jacksonville, Fla. Purchasing Code § 126.607. Section 126.603(a) of the ordinance defines an MBE as a business owned at least 50% by women or members of designated minority groups if the business is privately held and at least 51% so owned if publicly held.

Pursuant to §§ 126.604(b) and 126.605(b), the chief purchasing officer earmarks contracts for bidding by MBEs. Section 126.604(c) dictates, "[t]he [amount of the] set aside and the projects shall be deemed reserved for minority business enterprises only, and the projects shall be awarded directly to minority business enterprises." The ordinance establishes a pre-qualification procedure for ascertaining which businesses will have MBE status. *Id.* at § 126.606. The ten percent set aside may be waived by the chief purchasing officer upon evidence of, among other things, the unavailability of minority businesses and the city's cost in meeting the set-aside goals. *Id.* at § 126.608. During the program's five-year tenure, $14,625,000 in contracts was allocated to MBEs on the basis of racial criteria, approximately two percent of the city's total expenditures. There is no evidence as to what percentage of the total capital improvement and other contracts the MBE awards comprised.

AGC as a representative association may have standing to challenge the ordinance only if its members as individuals would have standing to litigate their claims. *Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333, 343-45, 97 S.Ct. 2434, 2441-42, 53 L.Ed.2d 383 (1977). To

invoke Article III standing, a plaintiff must (1) demonstrate injury of a direct, personal, economic or noneconomic, actual or threatened, real and not hypothetical nature; (2) show injury resulting from defendant's violation of a constitutional or statutory right; and (3) satisfy the court that plaintiff is within the zone of interests intended to be protected by the constitution or statute. Plaintiff must also show that the injury "is likely to be redressed by a favorable decision." *Valley Forge Christian College v. Americans United For Separation of Church and State, Inc.*, 454 U.S. 464, 472, 475, 102 S.Ct. 752, 758, 760, 70 L.Ed.2d 700 (1982) (citations omitted); *accord Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972). When, as here, only declaratory and injunctive relief are sought, plaintiff "must demonstrate that he is likely to suffer future injury." *Cone Corp. v. FLA Dept. of Transp.*, 921 F.2d 1190, 1203 (11th Cir.), *cert. denied*, __U.S.__, 111 S.Ct. 2238, 114 L.Ed.2d 479 (1991). Finally, plaintiff must plead standing through "specific, concrete facts." *Id.* at 1204 (citing *Warth v. Seldin*, 422 U.S. 490, 508, 95 S.Ct. 2197, 2210, 45 L.Ed.2d 343 (1975).

Plaintiff is unable to demonstrate injury of an economic nature. While over $14,000,000 in contracts was allocated to minority contractors during the set-aside program's five-year tenure, plaintiff has not demonstrated that, but for the program, any AGC member would have bid successfully for any of these contracts. *See Coral Constr. Co. v. King County*, 941 F.2d 910, 930 (9th Cir.) ("question is whether [plaintiff] has alleged a more certain injury than a potential lost bid"), *cert. denied*, __U.S.__, 112 S.Ct. 875, __L.Ed.2d__ (1992). AGC contends that the set-aside program acts as an absolute

bar to non-minority bidding for certain city contracts. While AGC is correct that the city's program operates by designating certain contracts for bidding solely by MBEs, it has not alleged that its members would have bid more successfully on any one or more of these contracts if not for the ordinance. We are barred by the decision in *Cone*, where a challenge by non-minorities to a set-aside program similar in operation to Jacksonville's was rejected for lack of standing because plaintiffs did not allege any specific contract lost on account of race. 921 F.2d at 1205-06; *accord Capeletti Brothers, Inc. et al. v. Broward County*, 738 F.Supp. 1415, 1417 (S.D. Fla. 1990) (plaintiff failed to specify particular project by which it suffered injury), *aff'd*, 931 F.2d 903 (11th Cir.), *cert. denied*, __U.S.__, 111 S.Ct. 2871, 115 L.Ed.2d 1037 (1991). AGC also alleges that it has been forced to discriminate in the award of its subcontracts so as to comply with the ordinance, presumably with a loss of profits. Again it fails to cite any specific subcontracts involved.

Plaintiff has not alleged specific noneconomic harm either. *See U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973) (holding noneconomic harm satisfies Article III standing requirements).

Since AGC has not demonstrated any injury, we need not consider the other components of Article III standing.

The judgment of the district court is VACATED and the case is REMANDED with the instruction that it be dismissed without prejudice.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

NORTHEASTERN FLORIDA CHAPTER
OF THE ASSOCIATED GENERAL
CONTRACTORS OF AMERICA, etc.
Plaintiff,

v. Case No. 89-278-Civ-J-16

CITY OF JACKSONVILLE, FLORIDA,
etc., et al.,

Defendants.

ORDER GRANTING
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The above-style cause is before the Court on Defendant's Motion for Judgment on the Pleadings or, in the Alternative, Summary Judgment, filed herein on July 10, 1989. Plaintiffs responded to Defendants' said motion on July 21, 1989, and subsequently cross-moved for summary judgment on October 20, 1989.

Procedural History

This action was brought by the Northeastern Florida Chapter of the Associated General Contractors of America (hereafter Northeastern Florida AGC), on April 4, 1989. The plaintiffs were seeking both declaratory and injunctive relief against the defendants' city ordinance that allocates a portion of municipal contracting dollars to businesses owned or controlled by members of minority groups. The ordinance established a "set aside" program whereby ten percent of monies to be used by the City of Jacksonville were to be awarded to Minority Business Enterprises.

On April 6, 1989, the Court issued a Temporary Restraining Order prohibiting the City from further implementing Ordinance Number 83-1200-647, § 126.601-611 of the City of Jacksonville Purchasing Code, and Subchapter 13 of the Rules of Duval County School Board.[1] Subsequently, on April 11, 1989, the Court held a hearing on plaintiff's Motion for Preliminary Injunction and heard argument from counsel of both the plaintiff and defendants. On April 20, 1989, the Court entered its Order granting plaintiff's Motion for Preliminary Injunction and enjoined the Defendants from enforcing or further implementing the ordinance in question.

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[1] The Duval County School Board is no longer a defendant in this case as a result of their voluntary discontinuance of awarding funds under their Subchapter 13 MBE program.

On May 12, 1989, the Defendant CITY and MAYOR appealed this Court's Order. By opinion dated March 2, 1990, the United States Court of Appeals for the Eleventh Circuit found that there was no necessity for the issuance of a preliminary injunction, reversed said issuance and remanded the case to this Court for an expedited trial or other disposition on the merits. Northeastern Florida Chapter v. Jacksonville, Fla., No. 89-3410, slip op. 2151 (11th Cir.) (Edmondson, J.)

Ordinance at Issue

The stated purpose of Ordinance 83-1200-647 is set out in § 126.601 which states that:

> (a) past inequities and disparities have disadvantaged minority business enterprises in the awarding of contracts by the City, and these minority business enterprises have been disadvantaged in their participation in the general welfare of the City and in City expenditures for services, supplies and materials.
>
> (b) the provisions of this Part 6 constitute a reasonable and necessary means, in the exercise by the City of its powers to make expenditures and to provide for the general welfare, to remedy such disadvantaged participation.

(Ordinance 83-1200-647 was eventually incorporated within § 126.601, *et seq.* of the City of Jacksonville Purchasing Code.) Under § 126-603(a), an MBE is defined as:

> ...a commercial or industrial enterprise, at least fifty percent of which is owned by minority group members or by women or, in the case of a publicly-owned

enterprise, at least fifty-one percent of the stock of which is owned by minority group members or by women.

Section 126-603(b) defines minorities to include blacks, Spanish-speaking Americans, Orientals, Indians, Eskimos, Aleuts and those handicapped.

Plaintiff's Case

The plaintiff, NORTHEASTERN FLORIDA AGC, is an association of persons and firms in the construction industry, who do business in Jacksonville. Northeastern Florida AGC's members are primarily, but not exclusively, non-minorities within the meaning of the MBE program. With the exception of those members who are women, handicapped or are a member of one of the defined groups in §126.603(b), Plaintiff's members are unable to compete for the contracts which are set aside for MBE firms in accordance with Defendants' program.

Plaintiff alleges that the City MBE program violates the Fourteenth Amendment of the United States Constitution; violates 42 U.S.C. § 1981 and, denies rights both protected by and enforceable under 42 U.S.C. § 1983.

Analysis

The United States Supreme Court has established the criteria which this Court must apply to evaluate the constitutionality of a local government's use of racial motivation in the awarding of public contracts. City of Richmond v. J.A. Croson Company, 488 U.S. 469, 109 S.Ct. 706 (1989).

The Supreme Court held that the use of racial criteria by a local government must be tested under the strict scrutiny standard of review. Any use of remedial racial preferences must be justified by a compelling state interest and must be narrowly tailored to achieve the remedial objective. The Croson decision was the first case in which strict scrutiny became the standard by which the constitutionality of awarding racially motivated public contracts by local government is tested.

The legislative body must have strong and specific evidence and "findings" of identifiable past racial discrimination and of present effects of such discrimination to establish a compelling government interest in applying race motivated criteria in enacting laws. Croson, 109 S.Ct. at 724. The mere recitation of a "benign" or legitimate purpose for a racial classification is entitled to little or no weight. *Id.* at 724, citing to Weinberger v. Wiesenfeld, 420 U.S. at 648, n.16, 95 S.Ct., at 1233, n.16. Racial classifications are suspect and that means that simple legislative assurances of good intention cannot suffice. *Id.* at 724. There must, as a matter of law, be a "strong basis in evidence for its (the legislature's) conclusion that remedial action was necessary." *Id.* at 724, quoting Wygant v. Jackson Board of Education, 476 U.S. 267, 277 (1986) (plurality opinion).

The MBE program of the City of Jacksonville suffers from the same constitutional infirmities that the Supreme Court found in the City of Richmond plan. There is not doubt that the Jacksonville plan relied heavily on what the Supreme Court has termed "societal discrimination." Unfortunately for the Defendants, however, such a basis is simply insufficient to rely

on to enact legislation utilizing racial preferences in the award of public contracts. Wygant at 274. In fact, in Defendants' Motion for Judgment on the Pleadings, it is readily admitted (as it is in Defendants' Answer) that the City had conducted no formal study prior to enacting the challenged ordinance. See Defendants' Motion, page 2, ¶3. This certainly flies squarely in the face of the "contemporaneous findings" requirement of Croson:

> While the states and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination, they must identify that discrimination, public or private, with some specificity before they may use race conscious relief.

Croson, 109 S.Ct. at 727.

As Chief Justice Burger stated in Fullilove v. Klutznick, 448 U.S. 448, 491 (1980), "Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." By the Defendants' own admissions, they simply did not have necessary factual findings before them to justify the enactment of a racially motivated ordinance. (The Court today need not reach the second strict scrutiny prong as to whether or not the ordinance was "narrowly tailored".)

Just as the Eleventh Circuit noted that it "too question(s) the ordinance's constitutionality," Northeastern Florida Chapter v. Jacksonville, Fla., No.89-3410, slip op. at 2152, and doubted "whether the Jacksonville set-aside program can survive the strict scrutiny required by the Supreme Court," *id.* at 2154, this Court today declares Jacksonville Ordinance

Number 83-1200-647 incorporated within § 126.601, *et seq.*, of the City's Purchasing Code facially unconstitutional. This ordinance fails to comport, as a matter of law, with the constitutional mandates enumerated by the United States Supreme Court in Croson.

Accordingly, it is now

ORDERED AND ADJUDGED:

The Defendants' Motion for Judgment on the Pleadings or, in the Alternative, Summary Judgment, be and the same is hereby DENIED, and that Plaintiffs Motion for Summary Judgment be and the same is hereby GRANTED. The Defendants are hereby enjoined from enforcing the provisions of Ordinance Number 83-1200-647, § 126.601-611, of the City of Jacksonville Purchasing Code, without prejudice to the Defendants to enact legislation it so deems advisable, and, complies with the constitutional mandates of Croson and Fullilove.

DONE AND ORDERED in Chambers in Jacksonville, Florida this 31 day of May, 1990.

s/ John H. Moore, II
UNITED STATES DISTRICT JUDGE

Ordinance No. 83-1200-647,
as amended by Ordinance No. 88-37-143

CITY OF JACKSONVILLE PURCHASING CODE

Part 6. Minority Business Enterprise Participation

126.601 Legislative findings. The Council finds and determines that:

(a) past inequities and disparities have disadvantaged minority business enterprises in the awarding of contracts by the City, and these minority business enterprises have been disadvantaged in their participation in the general welfare of the City and in City expenditures for services, supplies and materials.

(b) the provisions of this Part 6 constitute a reasonable and necessary means, in the exercise by the City of its powers to make expenditures and to provide for the general welfare, to remedy such disadvantaged participation.

126.602 Applicability. This part shall apply only to using agencies that are City agencies and shall not apply to the independent agencies. This part shall apply to all contracts funded in whole or in part by city funds, regardless of the source or sources of other funds; provided, that there shall be exempt from the requirements of this part any contract with respect to which a requirement for minority business enterprise participation is imposed by State or federal law.

126.603 Definitions. For purposes of this part, unless the context otherwise requires:

(a) Minority business enterprise means a commercial or industrial enterprise, at lease fifty-one percent of which is owned, operated and controlled by minority group members or by women or, in the case of a publicly-owned enterprise, at least fifty-one percent of the stock of which is owned by minority group members or by women.

(b) minority group member means a person who is, or considers herself or himself to be, in one of the following classes:

(1) black.
(2) Spanish-speaking American.
(3) Oriental.
(4) Indian.
(5) Eskimo.
(6) Aleut.
(7) handicapped.

(c) the terms *black, Spanish-speaking American, Oriental, Indian, Eskimo, Aleut* and *handicapped* have the meanings given to them by the Equal Employment Opportunity Commission in its rules defining and describing these terms.

126.604 Minority business enterprises: capital improvements contracts.

(a) With respect to the capital improvements contracts to be awarded during each fiscal year, there shall be set aside for minority business enterprise during the fiscal year an amount equal to ten percent of the total amount appropriated

for capital improvements (including projects to be constructed pursuant to the road program under Chapter 748) in the budget ordinance, or in any ordinance or resolution approving the issuance of bonds for capital improvement projects adjusted as follows:

(1) There shall be deducted from the total amount (before the reservation of the ten percent), the amounts listed in the budget ordinance for projects which are being carried forward under s. 106.309, except as provided in paragraph (3) for additional appropriations during the fiscal year.

(2) There shall be deducted from the total amount (before the reservation of the ten percent), the total amount listed in the budget ordinance for projects which are to be constructed by City forces.

(3) There shall be added to this ten percent set aside for minority business enterprises, an amount equal to ten percent of the appropriations during the fiscal year for capital improvements, whether as new projects or as additional appropriations for current projects. This paragraph shall not require that a project be subdivided solely in order that part of the project will be included in the set aside.

(4) Mathematical certainty is not required in determining the amount of the set aside; but the Chief Purchasing Officer shall make every attempt to come as close as possible to the ten percent figure. To the extent that less than ten percent can be set aside under the provisions of this subsection [considering the capital improvements contracts which it is possible to award under subsection (b)], the amount that cannot be set aside shall not be considered to be subject to

this part, and award of contracts can be made pursuant to Part 2 without regard to this part.

(b) As soon as the budget ordinance is enacted, the Chief Purchasing Officer, in consultation with the Director of Public Works and a designated representative of each division of the departments of the Consolidated Government (hereinafter called Division) funded for capital improvement projects, shall ascertain the amount of the capital improvements to be set aside under subsection (a) and the capital improvements contract which will be awarded out of this amount. When this amount is adjusted in accordance with paragraph (3) of subsection (a), the set aside will be reviewed and additional capital improvement projects will be included as necessary. Each Division funded for capital improvement projects shall report any changes to the Chief Purchasing Officer on a quarterly basis. In determining the projects which will be constructed under contracts awarded to minority business enterprise:

(1) the Chief Purchasing Officer shall endeavor to include projects representative of the total number of projects which will be constructed or undertaken and the types of trades which will be utilized during the fiscal year.

(2) a project shall be included in its entirety and shall not be subdivided solely in order to allow part of the project to be included in set aside, except where approved by the Mayor.

(3) mathematical certainty is not required in determining the capital improvements contracts which will be awarded out of this amount; but the Chief Purchasing Officer

shall make every attempt to utilize the entire amount set aside under this part.

(c) The amount of the set aside and the projects which it is proposed will be constructed out of the set aside shall be presented to the Mayor for his approval. Upon approval by the Mayor, the set aside and the projects shall be deemed reserved for minority business enterprises only, and the projects shall be awarded directly to minority business enterprises. Changes in the set aside or in the projects shall likewise be subject to approval by the Mayor. No contracts awarded to a contractor under the provisions of Part 2, without consideration of this part may be considered in whole or in part as a project awarded directly to minority business enterprise under this part, except when approved by the Mayor.

126.605 ____: other contracts.

(a) With respect to contracts for other than capital improvements to be awarded during each fiscal year, there shall be set aside for minority business enterprises during the fiscal year an amount equal to ten percent of the estimated amount to be expended for these contracts during the fiscal year, as follows:

(1) The set aside shall be classified in three classes:

(i) contracts for supplies;

(ii) contracts for contractual services (other than professional services); and

(iii) contracts for professional services.

(2) The ten percent requirement shall apply to the total estimated amount to be expended for all contracts during the fiscal year, but it shall be divided among the three classes in the same proportion as the total estimated amount for each class bears to the total estimated amounts for all classes together.

(3) There shall be added to this ten percent set aside for minority business enterprises, an amount equal to ten percent of the appropriations or transfers during the fiscal year for these contracts, whether as new contracts or as additional appropriations or transfers for current contracts. This paragraph shall not require that a contract be subdivided solely in order that part of the contract will be included in the set aside.

(4) Mathematical certainty is not required in determining the amount of the set aside; but the Chief Purchasing Officer shall make every attempt to come as close as possible to the ten-percent figure. To the extent that less than ten percent can be set aside under the provisions of this subsection [considering the contracts which it is possible to award under subsection (b)], the amount that cannot be set aside shall not be considered to be subject to this part, and awards of contracts can be made pursuant to Part 2 or Part 3

without regard to this part.

(b) As soon as the budget ordinance is enacted, the Chief Purchasing Officer, in consultation with a designated representative of each Division, shall ascertain the amount of the funds to be set aside under subsection (a), by each of the classes described in subsection (a)(1). When this amount is adjusted in accordance with paragraph (3) of subsection (a), the set aside will be reviewed and additional amounts will be included as necessary. When budgeted figures reported are changed during the course of the fiscal year, the designated Division representative shall report such changes to the Chief Purchasing Officer on a quarterly basis. In determining the contract which will be awarded to minority business enterprises under the section:

(1) the Chief Purchasing Officer shall prescribe by rule the method by which contracts in each of the classes described in subsection (a)(1) will be selected for award to minority business enterprises.

(2) A requirement for supplies, contractual services or professional services shall be included in its entirety and shall not be subdivided solely in order to allow part of the contract to be awarded in the set aside, except where approved by the Mayor.

(3) mathematical certainty is not required in determining the contracts which will be awarded out of this amount; but the Chief Purchasing Officer shall make every attempt to utilize the entire amount set aside under this part.

(c) The amount of the set aside shall be presented to the Mayor for his approval, by each of the classes described in subsection (a)(1). Upon approval by the Mayor, the set aside shall be deemed reserved for minority business enterprises only, and contracts shall be awarded directly to minority business enterprises. Changes in the set aside shall likewise be subject to approval by the Mayor. No contract awarded under the provisions of Part 2 or Part 3, without consideration of this part, may be considered in whole or in part as a contract awarded directly to minority business enterprises under this part, except where approved by the Mayor.

(d) For the purpose of determining whether the ten-percent set aside under this section has been met, the Chief Purchasing Officer shall average the amount set aside under this section over a period of two fiscal years. If the amount set aside in the first fiscal year of the period is:

(1) less than ten percent, the percentage by which this amount fails to reach ten percent shall be added to ten percent, and this aggregate percentage shall be required to be set aside during the second fiscal year of the period.

(2) more than ten percent, the percentage by which this amount exceeds ten percent shall be subtracted from ten percent, and the diminished percentage only shall be required to be set aside during the second fiscal year of the period.

A reduction made pursuant to s. 126.608 shall not affect this section.

126.606 Prequalification of minority business enterprises.

(a) In order that minority business enterprises will be able to participate in the program established by this part in a meaningful fashion, a prequalification procedure will be instituted by the Purchasing Division under rules promulgated by the Chief Purchasing Officer and approved by the Awards Committee or Evaluation Committee, as the case may be, and by the Director. This procedure shall apply to minority business enterprises seeking to be awarded contracts under s. 126.604; it may be extended to the minority business enterprises seeking awards of contracts under s. 126.605 if, in the opinion of the Chief Purchasing Officer, this is necessary in order that the minority business enterprises will more effectively be able to bid on these contracts.

(b) The prequalification procedure shall be open to any minority business enterprise that deems itself qualified to bid on and perform the type or types of contracts for which the prequalification procedure is designed. The prequalification procedure shall be fair and equitable and shall fairly ascertain the qualifications of the minority business enterprises included on it to bid on and perform the type or types of contracts for which the prequalification procedure is designed. The Chief Purchasing Officer shall make the initial determination as to the prequalification of a minority business enterprise and whether it shall be admitted to the list of prequalified bidders. A minority business enterprise that is denied prequalification shall have the right to appeal the denial to the Awards Committee or Evaluation Committee, as the case may be; the decision of the Committee shall be final. Prequalification

under this subsection shall not preclude a minority business enterprise from being included on the bidders' list provided for in s 126.106(m) for other supplies and services.

126.607. Subcontractors. A minority business enterprise that is awarded a contract under this part shall make every endeavor to expend as much of the contract as possible for minority business enterprise as subcontractors. At least fifty percent of the contract value of all subcontracts shall be required to be set aside for minority business enterprise subcontractors unless a greater or lesser percentage is specified in the invitation to bid or request for proposal. The Minority Business Coordinator of the City of Jacksonville and the Chief Purchasing Officer jointly may waive this requirement of fifty percent value set aside when minority business enterprise subcontractors are not available in the particular specialty, area or field involved in the set aside, or if more than fifty percent of the total contract has been contracted with minority business enterprises. All waivers granted shall be presented to the Mayor. A minority business enterprise contractor that consistently refuses to award subcontractors to minority business enterprise subcontractors may be barred by the Chief Purchasing Officer, pursuant to rules promulgated by him, from further participation in the minority business enterprise participation program under this part; a debarring by the Chief Purchasing Officer may be appealed to the Awards Committee or Evaluation Committee, as the case may be, whose decisions shall be final.

126.608. Waiver or reduction of percentage set aside in certain cases. The Chief Purchasing Officer may waive the percentage set aside under s. 126.604 or s. 126.605 or reduce the percentage to a definite amount less than the ten percent amount, based upon consideration of the following factors:

(a) the total dollar amount of the proposed set aside.

(b) the extent to which the type or types of contracts involved may be reasonably susceptible to separate contracting of portions of work, services, goods, supplies and the like.

(c) the particular type or types of work, services, goods, supplies and the like which are involved in the set aside.

(d) the availability of minority business enterprises in the particular contracting specialties, areas or fields involved in the set aside.

(e) the additional cost to the City of securing the specified percentage of minority business enterprise participation.

The determination by the Chief Purchasing Officer to waive or reduce the percentage of minority business enterprise participation shall be subject to review and approved by the Awards Committee or Evaluation Committee and shall become final only upon approval by the Mayor.

If a project is waived under the provisions of this part, the Chief Purchasing Officer may include the total amount of such waiver in reducing the set aside goal in the area of procurements covered by Sections 126.604 and 126.605.

126.609 Termination of contract awarded under s. 126.604 or s. 126.605. In addition to other methods provided by law for termination of contracts, a contract resulting from an award of contract under s. 126.604 or s. 126.605 may be terminated by the Chief Purchasing Officer upon:

(a) a determination by the Chief Purchasing Officer:

(1) that the contractor is not a qualified minority business enterprise as certified in the bid or proposal submitted by the contractor and upon the basis of which the contract was awarded,

(2) which is reviewed and approved by the Awards Committee or Evaluation Committee after giving notice and opportunity for a hearing to the contractor, and

(3) which is subsequently approved by the Mayor; and--

(b) thereafter by his giving not less than ten days advance written notice of the intended termination, exclusive of the date of termination, to the contractor by certified mail to the address indicated in the bid or proposal.

126.610 Quarterly reports by Chief Purchasing Officer to Mayor. Quarterly, the Chief Purchasing Officer shall report to the Mayor on the administration and operation of this part, specifically with reference to:

(a) the amount set aside under ss. 126.604 and 126.605, with appropriate adjustments as required by those sections and as permitted under s. 126.608.

(b) the number of contracts awarded to minority business enterprises under each section.

(c) whether the percentage amounts required by those sections are being met and whether a carryover may be necessary under s. 126.605(d).

(d) the use of minority business enterprise subcontractors under the requirements of s. 126.607, and whether any minority business enterprise contractors have been debarred under that section.

126.611 Other provisions of Purchasing Code to apply. Except as provided in this part to afford minority business enterprises easier access to the City contracting process, the provisions of Parts 1, 2, 3 or 4 apply. The rules of the Purchasing Division shall specify the manner in which conflicts between the provisions of Parts 1, 2, 3 or 4 and this part are to be resolved.

126.612. Policies and procedures for implementation of set aside program. The Chief Purchasing Officer and the Minority Business Coordinator shall prepare for approval by the Mayor policies and procedures regarding implementation of the set aside program. These policies and procedures, after approval by the Mayor, shall be applied in their entirety by the Chief Purchasing Officer and the Minority Business Coordinator in the operation of the set aside program.

126.613 Length of participation; repeal; saving clause. The minority business enterprise participation created by this part shall remain in effect for five (5) years from October 1, 1988. Thereafter, this part and the minority business enterprise participation established hereby shall

terminate and shall be repealed and of no further force and effect and all references throughout this Chapter to this part and to the minority business enterprise participation as a separate part of the Purchasing Code shall be removed and deleted. At such time the Council may re-enact this ordinance if the disparity in minority business enterprise participation has not been remedied.

Section 2. If any section, subsection, sentence, clause, or provision of this ordinance is held invalid, the remainder of this ordinance shall not be affected by such invalidity.

Section 3. This ordinance shall become effective upon signature by the Mayor or upon becoming effective without the Mayor's signature.

(2)

FILED
JUN 26 1992
OFFICE OF THE CLERK

No. 91-1721

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

NORTHEASTERN FLORIDA CHAPTER OF THE
ASSOCIATED GENERAL CONTRACTORS
OF AMERICA,

Petitioner,

v.

CITY OF JACKSONVILLE, FLORIDA and
TOMMY HAZOURI, in his official
capacity as Mayor of
the City of Jacksonville,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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June 26, 1992

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

Respondents, CITY OF JACKSONVILLE, FLORIDA, and TOMMY HAZOURI, hereinafter referred to as "City," restate the question presented as follows:

1

WHETHER AN ASSOCIATION CHALLENGING AN AFFIRMATIVE ACTION ORDINANCE MUST PLEAD AND PROVE INDIVIDUAL INJURY, WHICH IS SPECIFIC AND CONCRETE, AND NOT MERELY RELY ON A GENERALIZED GRIEVANCE, TO SATISFY ITS CONSTITUTIONAL STANDING?

TABLE OF CONTENTS

PAGES

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 6

REASONS FOR DENYING THE WRIT

THE ELEVENTH CIRCUIT, IN NORTHEASTERN FLORIDA CHAPTER V. CITY OF JACKSONVILLE, 951 F.2d 1217 (11TH CIR. 1992), CORRECTLY HELD THAT AN ASSOCIATION CHALLENGING AN AFFIRMATIVE ACTION ORDINANCE MUST PLEAD AND PROVE INDIVIDUALIZED INJURY, WHICH IS SPECIFIC AND CONCRETE, AND NOT MERELY RELY ON A GENERALIZED GRIEVANCE, TO SATISFY ITS CONSTITUTIONAL STANDING IN ACCORDANCE WITH SUPREME COURT PRECEDENT.

. 8

CONCLUSION 28

TABLE OF AUTHORITIES

CASES PAGES

Allen v. Wright,
468 U.S. 737 (1984) 25

Associated General Contractors of California, Inc. v. Coalition for Economic Equity,
950 F.2d 1401 (9th Cir. 1991) 20,21

Capeletti Bros., Inc. v. Broward County,
738 F.Supp. 1415 (S.D. Fla. 1990), aff'd 931 F.2d 903 (11th Cir. 1991) 17,18,19

City of Richmond v. J.A. Croson Co.,
488 U.S. 469 (1989) 23,27

Cone Corp. v. Florida Dept. of Transportation,
921 F.2d 1190 (11th Cir. 1991) . . . 8,15,16,17, ... 19,20,21,26

Coral Const. Co. v. King County,
941 F.2d 911 (9th Cir. 1991) . . 19,21

Diamond v. Charles,
476 U.S. 54 (1986) 10,25

Johnson v. Transportation Agency,
480 U.S. 616 (1987) 27

Lujan v. Defenders of Wildlife,
__ U.S. __, 1992 WL 125406 (June 12, 1992) 12,13

TABLE OF AUTHORITIES

CASES	PAGES
Northeastern Florida Chapter v. City of Jacksonville, 951 F.2d 1217 (11th Cir. 1992)	8,14, 15,26
S.J. Groves & Sons, Co. v. Fulton Co., 920 F.2d 752 (11th Cir. 1991) . . .	8,14,15,17, 18,19,20,26
University of California Regents v. Bakke, 438 U.S. 265 (1978)	23,24
U.S. v. SCRAP, 412 U.S. 669 (1973) . .	12,14,15
Valley Forge Christian College v. Americans for Separation of Church & State, Inc., 454 U.S. 464 (1982)	9,24
Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) .	20,21,22,24
Wards Cove Packing Co., Inc. v. Antonio, 490 U.S. 642 (1989)	27
Warth v. Seldin, 422 U.S. 490 (1975) .	9,10,11,12, 13,23,25
Whitemore v. Arkansas, 495 U.S. 149 (1990)	10,11,12,24,25

TABLE OF AUTHORITIES

CASES	PAGES
Wygant v. Jackson Board of Education, 476 U.S. 267 (1986)	27

OTHER AUTHORITIES

Article III, Section 2 of the **United States Constitution**	9

STATEMENT OF THE CASE

The Petitioner, NORTHEASTERN FLORIDA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, hereinafter referred to as "AGC", in its statement of the case, omits highly relevant information regarding the precise nature of the challenged affirmative action program.

The challenged City ordinance is directed at increasing the participation of minority business enterprises in government procurement. The legislative findings in Section 126.601 state that past inequities have existed in the awarding of contracts to minority business firms and these enterprises have been disadvantaged in their participation in the general welfare of the City and City expenditures. Petitioner's Appendix at 14, said Appendix hereinafter referred to as ("A:_").

The ordinance establishes an affirmative action program allocating ten

percent of certain contracting opportunities for minorities. The ordinance does not dictate a mandatory quota requiring a certain number of contracts to be let. In fact, Sections 126.604(a)(4), 126.604(b)(3), 126.605(a)(4) and 126.605(b)(3) declare that mathematical certainty is not required in reaching the goals. (A:15-21) Moreover, Section 126.608 contains a discretionary provision whereby the chief purchasing officer upon evidence of, among other things, the unavailability of minority businesses and the City's cost in meeting the goals, may waive the program's application. (A:24)

Amended Section 126.613 contains a specific durational period of five years from October 1, 1988. (A:26-27) Upon its expiration, the City Council may reenact the ordinance if the disparity in minority business participation has not been remedied. Id.

The AGC argues that its complaint alleges that non-minority members of the association otherwise eligible to compete for City contracts are restricted from doing so because of their race. Petition for Writ of Certiorari at 10-11, said petition hereinafter referred to as ("Petition"). In particular, the AGC argues that numerous non-minority members of the AGC would have bid on designated contracts but for the affirmative action requirements imposed by the ordinance. Id. The AGC claims that the City did not challenge these allegations below. This is a misstatement of the record. The City in its answer specifically denied these allegations. And, the record is devoid of any evidence supporting such allegations.

On the prior appeal of this case, the Eleventh Circuit, in **Northeastern Florida Chapter v. Jacksonville, Florida**, 896 F.2d 1283 (11th Cir. 1990), concluded that a preliminary injunction was not

warranted in that the record below was inadequate to sustain equitable relief. The Eleventh Circuit held that the AGC had failed to make the requisite showing of irreparable injury in that the association failed to bring forth representatives who could assert injury resulting from the City's enforcement of the affirmative action program. No further proof in support of the AGC's standing was offered from the filing of the complaint until the district court's rendering of the order granting summary judgment. Despite the Eleventh Circuit's clear guidance on this issue, the AGC failed to provide the district court with additional facts supporting its injury.

Since no evidence was received subsequent to the former appeal, the Eleventh Circuit, on the second appeal, vacated the summary judgment entered by the district court and directed the dismissal of the case without prejudice. The

Eleventh Circuit held that the AGC lacked constitutional standing in the absence of any demonstration of injury. **Northeastern Florida Chapter v. City of Jacksonville, Florida**, 951 F.2d 1217 (11th Cir. 1992).

SUMMARY OF THE ARGUMENT

The AGC has not provided a basis for the Supreme Court to accept review of this case. It has failed to demonstrate that the Eleventh Circuit decisions in **Northeastern Florida Chapter v. City of Jacksonville**, 951 F.2d 1217 (11th Cir. 1992); **Cone Corp. v. Florida Dept. of Transportation**, 921 F.2d 1190 (11th Cir. 1991); and **S.J. Groves & Sons, Co. v. Fulton Co.**, 920 F.2d 752 (11th Cir. 1991), conflict with Supreme Court precedent. The Eleventh Circuit declined jurisdiction of this constitutional challenge to the City's affirmative action ordinance in accordance with Article III requirements.

Article III of the Constitution requires a litigant demonstrate actual case and controversy before an adjudication on the merits. The AGC association failed to satisfy the essential element of injury. The complaint did not allege an injury-in-fact suffered as a result of the City's

implementation of the ordinance. The AGC further failed to carry its burden of proof on the motion for summary judgment in that no affidavit proving a past instance of injury was provided to the court. There was also no showing that the ordinance commands future unconstitutional conduct.

Accordingly, the Eleventh Circuit properly refrained from rendering an advisory opinion on the ordinance's constitutionality in the absence of Article III jurisdiction.

REASONS FOR DENYING THE WRIT

THE ELEVENTH CIRCUIT, IN NORTHEASTERN FLORIDA CHAPTER v. CITY OF JACKSONVILLE, 951 F.2d 1217 (11th Cir. 1992), CORRECTLY HELD THAT AN ASSOCIATION CHALLENGING AN AFFIRMATIVE ACTION ORDINANCE MUST PLEAD AND PROVE INDIVIDUALIZED INJURY, WHICH IS SPECIFIC AND CONCRETE, AND NOT MERELY RELY ON A GENERALIZED GRIEVANCE, TO SATISFY ITS CONSTITUTIONAL STANDING IN ACCORDANCE WITH SUPREME COURT PRECEDENT.

The Eleventh Circuit in **Northeastern Florida Chapter v. City of Jacksonville**, 951 F.2d 1217 (11th Cir. 1992); **Cone Corp. v. Florida Dept. of Transportation**, 921 F.2d 1190 (11th Cir. 1991); and **S.J. Groves & Sons, Co. v. Fulton Co.**, 920 F.2d 752 (11th Cir. 1991), faithfully adhered to the traditional requirements of constitutional standing.

These decisions do not conflict with any decision of the United States Supreme Court or the Ninth Circuit Court of Appeals cases cited by the AGC.

The fundamental predicate for standing is the demonstration of a threatened injury. Article III, Section 2 of the **United States Constitution** limits the exercise of judicial power to actual cases and controversies. To establish Article III standing, a plaintiff must demonstrate actual or threatened injury, fairly traceable to the challenged action, and redressable by a favorable decision. **Valley Forge Christian College v. Americans for Separation of Church & State, Inc.**, 454 U.S. 464, 472 (1982). In **Warth v. Seldin**, 422 U.S. 490 (1975), the Court stated:

> In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a 'case for controversy' between himself and the defendant within the meaning of Article III. This is the threshold question in every

> federal case, determining the power of the court to entertain the suit. As an aspect of justiciability, the standing question is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf.

Id. at 498-499.

Article III demands that a plaintiff clearly and specifically set forth facts sufficient to satisfy judicial intervention. **Warth v. Seldin, supra,** 422 U.S. 490, 501. There is a necessity that a litigant plead a "distinct and palpable" injury, that is, he has suffered an "injury-in-fact." **Whitemore v. Arkansas,** 495 U.S. 149, 155 (1990). Allegations of possible future injury do not constitute "injury-in-fact." **Diamond v. Charles,** 476 U.S. 54 (1986). The injury must be real and immediate and not conjectural or hypothetical. **Id.**

An association may have standing under Article III to secure judicial relief. **Warth v. Seldin, supra** 422 U.S. 490, 511. Like any other litigant, an association is required to set forth "injury-in-fact" to at least one of its members resulting from the challenged action. Id. It is essential that a court decline jurisdiction in the absence of allegations of such individualized injury. **Id.**

AGC's complaint below consists solely of bare conclusions to the effect that the AGC has been injured. The deficiency of the allegations is clearly apparent in that it does not meet minimal standing requirements. No distinct or palpable injury has been pled. The complaint fails to identify any personal injury sustained by an AGC member sufficient to confer the "case and controversy" threshold. The complaint also fails to allege that a specific contract

was lost due to the City's implementation of the affirmative action ordinance.

The plaintiff bears the burden of presenting specific concrete facts demonstrating particularized injury. **Warth v. Seldin, supra** 422 U.S. 490, 508. The Supreme Court, in **Lujan v. Defenders of Wildlife**, __ U.S. __, 1992 WL 125406 (June 12, 1992), recently reiterated the principle that the party invoking federal jurisdiction has the burden of proof on the elements required to sustain its standing. A court may not embellish deficient allegations of standing to create jurisdiction. **Whitemore v. Arkansas, supra** 495 U.S. 149, 155-156. The allegations must be true and capable of proof at trial. **U.S. v. SCRAP**, 412 U.S. 669, 689 (1973).

The **Lujan** Court summarized the evidentiary requirements necessary to establish injury, as follows:

> [T]hey are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of litigation . . . At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice . . . In response to a summary judgment motion, however, the plaintiffs can no longer rest on such "mere allegations," but must "set forth" by affidavit or other evidence "specific facts" . . .

Lujan v. Defenders of Wildlife, supra ____ U.S. ____, 1992 WL 125406 at 4. (citations omitted). A court has the authority to allow an amendment to a complaint or submission of a supplemental affidavit to support standing. **Warth v. Seldin, supra**, 422 U.S. 490, 501.

The AGC failed to satisfy the weighty burden of proof required to establish constitutional standing under Article III and to maintain this lawsuit. Despite the fact the AGC did not plead clear instances of past injury, the court

could have considered any instances of injury submitted with AGC's motion for summary judgment. No such evidence was submitted by the AGC to fulfill its evidentiary burden on the summary judgment motion.

The AGC admits that the record does not contain any proof of standing beyond the allegations of the complaint but contends that the City did not raise the issue in the trial court. (Petition at 11 n. 2 and 16 n. 3) The AGC had the opportunity to submit affidavits prior to the court's decision on the motion for summary judgment. The AGC failed to do so. Accordingly, the Eleventh Circuit properly dismissed the complaint because the AGC did not provide "specific facts" supporting the essential element of injury-in-fact which could serve as a basis for constitutional standing.

The AGC argues that the Eleventh Circuit holdings in **Northeastern Florida**

Chapter v. City of Jacksonville, supra, 951 F.2d 1217; **Cone Corp. v. Florida Dept. of Transportation, supra,** 921 F.2d 1190; and **S.J. Groves & Sons, Co. v. Fulton Co., supra,** 920 F.2d 752, rigidly require a plaintiff challenging the constitutionality of an affirmative action ordinance to establish standing only by demonstrating that a specific contract was lost on account of race.[1] (Petition at 16-17) This characterization of these decisions is inaccurate. They do not create a new mechanical bright line test for standing but are consistent with the Supreme Court view.

The Eleventh Circuit, in **Cone,** held that the contractors did not satisfy Article III standing in that they failed to

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1. The Eleventh Circuit, in **Northeastern Florida Chapter v. Jacksonville, Florida, supra,** recognized that noneconomic injury also satisfies Article III standing. **See U.S. v. SCRAP, supra,** 412 U.S. 669. The AGC's complaint does not allege such harm.

show either that they had been denied any contracts on the basis of race or that the operation of the Florida statute at issue would necessarily result in an equal protection violation. After reviewing the relevant Supreme Court decisions, the Eleventh Circuit concluded that there are two types of allegations which may be used to demonstrate particularized injury necessary to meet Article III standing. **Id.** at 1205 n. 48. Plaintiff may assert specific past instances of injury, or that a challenged ordinance mandates future unconstitutional conduct. **Id.**

The **Cone** Court found that no facts existed to support the allegation of past injury because no contract was presented demonstrating denial of an award on the basis of race. **Id.** at 1205-1206. The Eleventh Circuit also reviewed the subject statute and concluded that the program did not require future denial of equal protection:

> For us to find a denial of equal protection under this scenario, we would have to say that the statute plainly requires the Secretary to deny equal protection, this is, a Florida court interpreting Florida law, could not reasonably conclude otherwise, and that the regulations -- to the extent that they allow the Secretary to exercise discretion -- are a nullity. We conclude, on the contrary, that Section 339.0805 on its face does not direct the secretary to violate the fourteenth amendment; consequently, the statute, itself, does not provide proof that the Secretary is likely to deny plaintiff's equal protection of the laws in letting highway contracts.

Id. at 1208.

In **S.J. Groves,** the plaintiff claimed, among other things, injury from a lost opportunity to compete equally with contractors for county projects. **Id.** at 757-758. The Eleventh Circuit concluded that the claim of lost opportunity to compete on an equal basis with other bidders was not a cognizable Article III injury in that the questioned law did not

prevent the plaintiff from competing. **Id.** Accordingly, the case was dismissed for lack of standing since no past or likely future injury was proven.

The Eleventh Circuit also affirmed the ruling in **Capeletti Bros., Inc. v. Broward County**, 738 F.Supp. 1415 (S.D. Fla. 1990), aff'd 931 F.2d 903 (11th Cir. 1991). The district court ruled that the plaintiffs had no standing to maintain their lawsuit because they lacked injury-in-fact. **Id.** at 1416. The plaintiffs failed to specify any particular project which caused them harm. **Id.** at 1417. Absent was any allegation that the plaintiff submitted a bid that was rejected. **Id.** After analyzing the ordinance, the Court determined that the subject program was not mandatory but rather a set of guidelines. The Court noted the insufficiency of the injury allegation:

> Armed with the Supreme Court decision, the plaintiffs come to court and ask the undersigned, in effect, to set itself up as a constitutional board of inquiry and issue an advisory opinion on the constitutionality of the county's program. Especially when a case presents an issue of constitutional law, the court will decline to cull the statute books when no specific factual situation is presented. Under Article III, § 2 of the Constitution, this court can only decide cases and controversy.

Id. at 1418.

The AGC argues that the Ninth Circuit decision in **Coral Const. Co. v. King County**, 941 F.2d 911 (9th Cir. 1991), is in conflict on the issue of standing with the Eleventh Circuit cases reviewed above. (Petition at 12-14) The opinions are, in fact, completely harmonious with each other.

The Ninth Circuit reviewed the King County ordinance and expressly accorded deference to the Eleventh Circuit decisions in **Cone** and **S.J. Groves.** The specific ruling in **Coral Const.** turned upon the

application of the particular facts distinguishing the cases. In contrast to **Cone**, the Court stated that the complaint contained sufficient factual allegations that the Plaintiff would compete for future contracts. **Id.** at 929. Consistent with **S.J. Groves**, however, the Court concluded that such allegations of injury were insufficient because it was too speculative to presume that the plaintiff would be a low bidder but lose an award. **Id.** at 929-930.

The Ninth Circuit held that the plaintiff demonstrated standing in light of the specific ordinance at issue which dictated future unconstitutional conduct. The ordinance contained a preference method which conferred an automatic competitive advantage to women. This showing of unequal competition satisfied the future threatened injury requirement for Article III standing. **Id.** at 930. See **Associated General Contractors of California, Inc. v.**

Coalition for Economic Equity, 950 F.2d 1401 (9th Cir. 1991).[2]

Unlike the King County ordinance, the AGC has not demonstrated that the ordinance herein commands unconstitutional conduct by the City. In sharp contrast, the ordinance vests discretion with the City's chief purchasing officer. Section 126.608. (A:24) The City's ordinance is similar to the Florida statute in **Cone** as the Eleventh Circuit found on the appeal herein. Moreover, the record does not indicate a single past instance of unconstitutional enforcement of the ordinance.

The Eleventh Circuit opinions are also consistent with the Supreme Court's application of the Article III standing doctrine. AGC relies heavily on **Village of**

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2. It should be highlighted that the **Coral Const.** plaintiff established past injury-in-fact under the MBE component of the ordinance in that its low bid was rejected because of enforcement of the automatic bid preference. **Id.** at 914.

Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), to support the proposition that the failure to specify a particular project lost as a result of race is not fatal to a plaintiff's standing. (Petition at 20-21) A close examination of the decision reveals that the definite injury threshold was satisfied therein.

The **Village of Arlington Heights** Court found that an individual plaintiff demonstrated injury by testifying that if a certain project were constructed, he would move there since it was closer to his job. **Id.** at 264. If the Court granted the requested relief, there was thus a substantial probability of redress for the injury. **Id.** In addition, the Court noted that the non-profit developer corporation expended thousands of dollars in furtherance of the development and had a concrete interest in making low cost housing available. **Id.** at 262-263.

The AGC further relies on the Court's decision in **University of California Regents v. Bakke**, 438 U.S. 265 (1978). (Petition at 22-23, 26) However, the **Bakke** case did not expand Article III standing.[3] The Court found that Bakke had suffered "injury in fact" in that he would have been admitted to either the 1973 or 1974 entering class in the absence of the special admissions program. **Id.** at 280. The Court expressly acknowledged that the petitioner had conceded the existence of "injury" and that this fact was reflected in the record. **Id.** at 281 n. 14. The Court stated <u>in dicta</u> that standing was established by the mandatory nature of the

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3. In **Warth v. Seldin, supra,** the Court held that an association lacked standing in that it failed to specify a particular project precluded by a zoning ordinance. Id. at 516-517. The Court also found that no facts were alleged showing a substantial probability affordable housing would be obtained in the absence of the ordinance. Id. at 504. In contrast, in **City of Richmond v. J.A. Croson Co.**, 488 U.S. 469 (1989), Article III standing was clearly present because a contractor had suffered a distinct and concrete injury when it failed to obtain a contract but for a set aside ordinance.

special program where white disadvantaged students were precluded from consideration. **Id.**

Unlike the cases of **Village of Arlington Heights** and **Bakke**, the AGC failed to demonstrate that the City's affirmative action ordinance necessarily precludes any of its members from receiving City contracts. The program provides for discretionary application. Moreover, even assuming arguendo that the ordinance is struck down, it is too speculative to presume that an AGC member would benefit by the award of City contracts.

The Supreme Court has refrained from ruling on the constitutionality of a legislative act unless obligated to do so in the context of a case and controversy raised by a litigant with a direct stake in the outcome. **Valley Forge College v. American United, supra**, 454 U.S. 464, 474. The Court, in **Whitemore v. Arkansas, supra**, 495 U.S. 149, stressed that Article III

case and controversy is imposed by the Constitution and that the Court is powerless to expand its jurisdictional role to hear certain cases even in the furtherance of good public policy. **Id.** at 161. The presence of a disagreement, however acrimonious, does not support a basis for Article III jurisdiction. **Diamond v. Charles, supra,** 476 U.S. 54, 62. A party has no standing to simply complain that the government is violating the law. **Id. Allen v. Wright**, 468 U.S. 737, 755-756 (1984). If this were to the contrary, the judiciary would have the function of deciding abstract questions of public concern even though the other branches of government might be more competent to handle generalized grievances. **Warth v. Seldin, supra**, 422 U.S. 490, 500.

The AGC treats Article III jurisdiction as a troublesome hurdle to overcome in its quest to overturn the City's affirmative action ordinance. The

AGC's generalized grievance in opposition to the ordinance does not obviate the constitutional necessity for the proper showing of standing. The Eleventh Circuit correctly dismissed the lawsuit without prejudice in the absence of a demonstration of actual case and controversy. The Court's application of Article III standing recognized such a result was required in face of the present record's inadequacy.

The AGC further concedes that the remaining appellate cases it cites have not considered the identical issue presented by the Petition for Writ of Certiorari. (Petition at 12) As demonstrated above, the petition should be denied because the Eleventh Circuit in **Northeastern Florida Chapter v. City of Jacksonville, supra,** 951 F.2d 1217; **Cone v. Florida Dept. of Transportation, supra,** 921 F.2d 1190; and **S.J. Groves & Sons, Co. v. Fulton Co., supra,** 920 F.2d 752, properly followed

Supreme Court precedent.[4]

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4. The Eleventh Circuit below vacated the district court's grant of summary judgment in favor of the AGC. The district court's decision was based upon its erroneous reading of City of Richmond v. J. A. Croson, supra, 488 U.S. 469, as restricting the defense of an affirmative action program to evidence which was physically before a legislative body. This requirement that a certain type legislative procedural fact-finding precede the enactment of an ordinance is an unwarranted encroachment into the law-making process. The City should have been permitted to present a substantive defense with the presentation of any relevant evidence supporting the legislation.

Moreover, the district court improperly shifted the ultimate burden of proof to the City to prove the constitutionality of the ordinance. This conflicts with the established rules of American jurisprudence requiring that the ultimate burden of proving discrimination remain with the plaintiff at all times. Johnson v. Transportation Agency, 480 U.S. 616, 626-627 (1987) citing Wygant v. Jackson Board of Education, 476 U.S. 267, 277-278 (1986); Wards Cove Packing Co., Inc. v. Antonio, 490 U.S. 642 (1989).

The imposition of strict scrutiny review should have not changed the proper allocation of proof. Even though strict scrutiny review makes the AGC's constitutional challenge easier by reducing the quantum of evidence necessary to overturn the ordinance, the AGC should not have been permitted to present absolutely no evidence to meet its burden. The City went well beyond mere articulation of a nondiscriminatory rationale for its implementation of the affirmative action program.

Accordingly, the district court's summary judgment in favor of AGC should have been vacated in any event. On the appeal, however, the Eleventh Circuit did not reach the merits of these substantive arguments. The Court dismissed, without prejudice, the AGC challenge on the issue of standing.

CONCLUSION

For all of the above reasons, the City respectfully requests that the United States Supreme Court deny this Petition for Writ of Certiorari.

Respectfully submitted,

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No. 91-1721

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

NORTHEASTERN FLORIDA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA,
Petitioner,

v.

CITY OF JACKSONVILLE, FLORIDA and TOMMY HAZOURI, in his official capacity as Mayor of the City of Jacksonville,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONER

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August 3, 1992

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. FEDERAL APPELLATE AND DISTRICT COURTS HAVE ESTABLISHED CONFLICTING RULES REGARDING STANDING TO CHALLENGE RACE-CONSCIOUS PROGRAMS 2

II. REQUIRING THAT A PLAINTIFF BE ABLE TO IDENTIFY IN ITS PLEADINGS A SPECIFIC CONTRACT LOST DUE TO A RACE-CONSCIOUS PROGRAM CONTRADICTS THE PRECEDENT OF THIS COURT 3

CONCLUSION 7

TABLE OF AUTHORITIES

Lucas v. South Carolina Coastal Council,
____ U.S. _____, 60 U.S.L.W. 4842,
1992 Westlaw 142517 (1992) . . . . . 3, *passim*

Lujan v. Defenders of Wildlife,
____ U.S. ____, 112 S.Ct. 2130 (1992) . . . . . 4, *passim*

O'Donnell Construction Co. v. District of Columbia,
963 F.2d 420 (D. C. Cir. 1992) 2

INTRODUCTION

Pursuant to Rule 15.7 of the Supreme Court Rules, Petitioner respectfully presents to this Court the following supplemental authority that was not available at the time that Petitioner filed its initial Petition for Writ of Certiorari.

As shown by Petitioner in its intial Petition, the question presented for review is whether an association challenging a racially exclusive government ordinance must show that, absent the ordinance, its members actually would have received a government contract. Petitioner urged this Court to grant certiorari in order to clarify a split in the lower federal courts and because the decision of the Eleventh Circuit Court of Appeals was contrary to the precedent of this Court. Since the time that Petitioner filed its initial petition, the Court of Appeals for the District of Columbia and this Court have rendered decisions that illustrate the need for this Court to review the Eleventh Circuit's erroneous requirements of injury-in-fact.

I. FEDERAL APPELLATE AND DISTRICT COURTS HAVE ESTABLISHED CONFLICTING RULES REGARDING STANDING TO CHALLENGE RACE-CONSCIOUS PROGRAMS.

On page 12 of its Petition for Writ of Certiorari, Petitioner AGC cited *O'Donnell Construction Co. v. District of Columbia*, 762 F. Supp. 354 (D.D.C. 1991). Since the original petition was filed, the Court of Appeals for the District of Columbia has considered that case. *O'Donnell Construction Co. v. District of Columbia*, 963 F.2d 420 (D.C. Cir. 1992). The appellate court reversed the district court's refusal to issue an injunction prohibiting enforcement of the District's minority business enterprise ordinance, *id.*, but agreed with the district court on the plaintiff's standing. "The district court was right in rejecting [the standing] challenge on the ground that the complaint, backed by Arnold J. O'Donnell's affidavit, alleged that the company . . . was suffering an injury because of the MBE program, which *deprived the company of the opportunity to compete on an equal footing* for the District's contracts." *Id.* at 423 (emphasis added). Noting that

the defendant had not pursued its standing challenge on appeal, the court found further analysis unnecessary. *Id.*

II. REQUIRING THAT A PLAINTIFF BE ABLE TO IDENTIFY IN ITS PLEADINGS A SPECIFIC CONTRACT LOST DUE TO A RACE-CONSCIOUS PROGRAM CONTRADICTS THE PRECEDENT OF THIS COURT.

In *Lucas v. South Carolina Coastal Council*, ___ U.S. _____, 60 U.S.L.W. 4842, 1992 Westlaw 142517 (1992), this Court considered the question of injury-in-fact in relation to a takings claim under the fifth amendment to the U.S. Constitution. Petitioner David Lucas, who had been prevented from making any economically viable use of his coastal property because of a coastal protection bill enacted by the State of South Carolina, sued for compensation. Before reaching the merits of the takings claim, this Court determined that Lucas in his complaint "properly alleged Article III injury-in-fact in this case," *id.* at p. 5, at least in regard to the earlier version of the statute enacted in 1989. Lucas had asked "'damages for the temporary taking of his property'"

dating from the initial enactment of the state statute. *Id.* at p. 5, n. 3. The Court stated, "No more can reasonably be demanded." *Id.*

Lucas never submitted a development plan for his property to the appropriate state authorities and was never actually denied the right to build on his property. *Id.* at p. 5, n.3. Nevertheless, this Court found Lucas's failure to be no bar to standing because of the stipulation in the record that he would have received no permit under the 1989 statute, and "such a submission would have been pointless." *Id.*

The *Lucas* opinion noted the contrary result in *Lujan v. Defenders of Wildlife*, ____ U.S. ____, 112 S.Ct. 2130 (1992). In that case, as the respondent in this case has noted, this Court held that plaintiffs in an environmental lawsuit had failed to prove sufficient injury-in-fact from environmental harms occurring outside the United States. The Court made a significant distinction, however, between the proof required at the pleading stage and that required in response to a motion for summary

judgment challenging standing. The Court specifically stated (in the section quoted by respondents in this case) that at the pleading stage, general factual allegations may suffice. *Id.*, 112 S.Ct. at 2137. In response to a motion for summary judgment, however, the plaintiff must present affidavits or other evidence setting forth "specific facts." *Id.*

In the *Lucas* decision, this Court further clarified this distinction. Because of the way that the South Carolina court had foreclosed further pleading in regard to Mr. Lucas's claim under the 1989 state statute, this Court addressed that particular claim "as if the case were here on the pleadings alone." *Lucas*, 1992 Westlaw 142517 at p. 5, n. 3. *Lujan*, by contrast, involved a motion for summary judgment and required "specific facts to be adduced by sworn testimony." *Id.* If the respondent in *Lujan*, had challenged the generalized allegations of injury-in-fact at the pleading stage, the challenge "would have been unsuccessful." *Id.*

Similarly, the standing issue in the instant case should be considered in light of the pleadings. Although the district court

did grant summary judgment to AGC on the merits of the case, AGC's standing was never an issue in that court. In fact, the city filed its own motion for judgment on the pleadings (or in the alternative summary judgment) on the merits of the ordinance, but never challenged AGC's standing. As in *Lucas*, standing came up only after the record was closed in the trial court. The Eleventh Circuit Court of Appeals foreclosed any possibility of evidence being presented on AGC's claim by ordering it dismissed rather than returned to the trial court for further proceedings.

Thus, AGC's standing should be considered on the basis of its pleadings rather than any failure to meet a nebulous, *ex post facto* standard. AGC presented no evidence of actual contracts lost because of the Jacksonville ordinance, but like David Lucas, it demonstrated that such applications would, at least 10% of the time, be futile. Like David Lucas, it presented sufficiently specific injuries in its pleadings to withstand the scrutiny appropriate for that stage of the trial. It is only if the court applies the more strict, inappropriate summary judgment standard that

AGC's evidence falls short. As this Court recognized in its most recent decisions, pleadings are different from summary judgment. The instant case falls within the parameters of *Lucas*, not *Lujan*.

CONCLUSION

For all of these reasons, Petitioner respectfully requests that this Court grant its petition for writ of certiorari.

Respectfully submitted,

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Supreme Court, U.S.
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No. 91-1721

IN THE
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OCTOBER TERM, 1991

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED APRIL 27, 1992
CERTIORARI GRANTED OCTOBER 5, 1992

No. 91-1721

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

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ON WRIT OF CERTIORARI TO THE UNITED STATES
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CERTIORARI GRANTED OCTOBER 5, 1992

TABLE OF CONTENTS

Docket, United States District Court,
Middle District of Florida,
Jacksonville Division 1

Complaint 7

Answer 24

Opinion, United States Court of Appeals
for the Eleventh Circuit,
rendered March 2, 1990 34

Opinion, United States District Court
for the Middle District of Florida,
Jacksonville Division, rendered May 31, 1990 . . . . Pet. App.*

Opinion, United States Court of Appeals
for the Eleventh Circuit,
rendered January 28, 1992 . . . . . Pet. App. *

City of Jacksonville, Fla. Purchasing Code
§§ 126.601-126.611 (1984),
as amended (1988) . . . . . Pet. App. *

* These documents were printed in the Appendix to the Petition for Writ of Certiorari and, pursuant to Rule 26.1 of the Rules of this Court, are not reproduced in this Joint Appendix.

DOCKET FOR
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Docket No. 89-00278 Filed 4/4/89

CAUSE: Title 42 Sec. 1983 - Other Civil Rights - violation of Equal Protection

PLAINTIFFS:	**DEFENDANTS:**
NORTHEASTERN FLORIDA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, a Florida Corporation not for profit	CITY OF JACKSONVILLE, FLORIDA, a Florida Municipal Corporation TOMMY HAZOURI[1], in his official capacity as Mayor of the City of Jacksonville; DUVAL COUNTY SCHOOL BOARD, a body corporate and politic; STAN JORDAN, in his

[1]Tommy Hazouri is no longer Mayor of the City of Jacksonville. Petitioner and Respondent have substituted the current Mayor, Ed Austin, in the caption of this case pursuant to Rule 35.3 of the Rules of this Court.

official capacity as Chairman of the Duval County School Board.

4/4/89 **COMPLAINT** for Declaratory and Injunctive Relief.

4/4/89 **MOTION** for Temporary Restraining Order by Plaintiff.

4/4/89 **MOTION** for Preliminary Injunction by Plaintiff.

4/4/89 **BRIEF** in Support of Plaintiff's Motion for Preliminary Injunction and Motion for Temporary Restraining Order.

4/4/89 **APPENDIX** to Plaintiff's Motion for Temporary Restraining Order and Motion for Preliminary Injunction by Plaintiff.

4/4/89 **CERTIFICATE** of Service of nos. (1 through 7) by personal service upon James L. Harrison, City of Jacksonville, General Counsel by plaintiff.

4/4/89 **TEMPORARY** Restraining Order. The Motion for Temporary Restraining Order is **GRANTED,** (2) and Defendants, their representatives, agents, and employees are temporarily prohibited from using racial or ethnic criteria in deciding whether bids submitted on contracts are responsive, whether such bids will be considered, and whether contracts will or will not be awarded to one who submits a bid which does not satisfy a racially based set-aside or participation requirement, until such time as the

parties can be heard further on Pltf's Motion for Preliminary Injunction. Defts STAN JORDAN and the DUVAL COUNTY SCHOOL BOARD are **ENJOINED** from enforcing any MBE set-aside or participation requirements with respect to pending invitation to bid number XF-0117-89 until hearing on Pltf's Motion for Preliminary Injunction and further order of this Court.

4/10/89 **MOTION** for Taking of Testimony at Hearing in Motion for Preliminary Injunction with MEMO in Support of attached.

4/10/89 **ORDER:** Pltf's Motion for Taking of Testimony is **DENIED**.

4/10/89 **MEMO** of Defts in Opposition to motion for Preliminary Injunction.

4/11/89 **RECORD** of Hearing on Pltf's Motion for Preliminary Injunction.

4/20/89 **ORDER:** Pltf's Motion for preliminary injunction is **GRANTED**. Defts and their representatives, agents, and employees are hereby **ENJOINED** from enforcing, pursuing or taking any further action to implement Ordinance Number 83-1200-647.

4/28/89 **ANSWER** of Defts; to Complaint

5/12/89 **NOTICE** of **appeal** (of order 27 granting the Pltfs motion for preliminary injunction, ... by Defts CITY OF

JACKSONVILLE, FLORIDA and TOMMY HAZOURI.

7/10/89 **MOTION** for judgment on the pleadings or, in the alternative, summary judgment/with memo thereon, by Defts.

7/21/89 **RESPONSE** to Motion for Judgment on the Pleadings or, in the Alternative, Summary Judgment by Pltf.

7/21/89 **ATTACHMENT "A"** to Pltf's Response to Defts' MEMO in Support of Defts' Motion for Judgment on the Pleadings or, in the Alternative, Summary Judgment.

10/20/89 **MOTION** for Summary Judgment by Pltf.

10/20/89 **STATEMENT** of Material Facts as to which there exists no Genuine Issue by Pltff.

10/20/89 **MEMO** in Support of Pltf's Motion for Summary Judgment

11/01/89 **RESPONSE** and MEMO in Opposition to Pltf's Motion for Summary Judgment by Defts. CITY OF JACKSONVILLE, FLORIDA and TOMMY HAZOURI.

1/4/90 **NOTICE** of Supplemental Authority to Defts' CITY OF JACKSONVILLE, FLORIDA and TOMMY HAZOURI, Response and MEMO in Opposition to Pltf's Motion for Summary Judgment; by Defts' CITY OF JACKSONVILLE and TOMMY HAZOURI.

4/6/90 **RECEIVED** certified copy of Judgment, opinion, bill of costs and 2 volumes of the record on appeal from the United States Court of Appeals.

4/6/90 **JUDGMENT**: it is ordered and adjudged that the order of the District Court appealed from in this cause is hereby REVERSED; and that this cause is REMANDED to said District Court for further proceedings in accordance with the opinion of this Court; It is further ordered that pltf-appellee pay to deft-appellants, the cost on appeal to be taxed by the Clerk of this Court. TJOFLAT, Chief Judge, specially concurred and filed an opinion. (27) EOD March 2, 1990. ISSUED AS MANDATE; April 4, 1990. (copy to JHM).

4/6/90 **OPINION** of the United States Court of Appeals. MR 117/0685.

5/3/90 **RECORD** of Hearing on Proceedings of Final-Pretrial Conference.

5/3/90 **PRE-TRIAL ORDER;**

5/31/90 **ORDER GRANTING Pltf's MOTION FOR SUMMARY JUDGMENT.** Defts' Motion for Judgment on the Pleadings or, in the Alternative, Summary Judgment is **DENIED**, and that Pltf's Motion for Summary Judgment is **GRANTED**.

6/6/90 **NOTICE** of Appeal.

7/2/90	**MOTION** for Attorney's Fees by Pltf.
7/2/90	**BRIEF in Support of Pltf's Motion for Attorney's Fees;** by Pltf.
7/23/90	**RESPONSE** to Motion for Attorney's Fees by Defts.
1/24/91	**ORDER** on attorneys' fees. Pltf's motion for attorney's fees is GRANTED, and the Deft. shall pay to the Pltf. the sum of $22,630.00 as and for the Pltf's attorney's fees.
2/13/91	Amended **NOTICE OF APPEAL** by City of Jacksonville, Tommy Hazouri
2/24/92	**ORDER OF USCA**: It is ordered that the judgment of the district court is vacated and this cause is remanded to said district court with instructions in accordance with the Opinion of this Court. Mandate date: 2/20/92
9/30/92	**ORDER OF DISMISSAL**: this cause is hereby dismissed without prejudice mooting motion for continuance of trial, mooting motion for entry of judgment, mooting motion for entry of judgment in favor of defendants, mooting motion for Pretrial Evidentiary Ruling (Signed by Chief Judge John H. Moore II, counsel notified)
9/30/92	Case closed

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

NORTHEASTERN FLORIDA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, a Florida Corporation not for profit,

Case No. 89-278-Civ-J-16

Plaintiff,

v.

CITY OF JACKSONVILLE, FLORIDA, a Florida Municipal Corporation; TOMMY HAZOURI, in his official capacity as Mayor of the City of Jacksonville; THE DUVAL COUNTY SCHOOL BOARD, a body corporate and politic; and STAN JORDAN, in his official capacity as Chairman of the Duval County School Board,

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

COMES NOW Northeastern Florida Chapter of the Associated General Contractors of America, Plaintiff in the above-styled action, and states its complaint as follows:

PRELIMINARY STATEMENT

1. This is an action for a declaratory judgment pursuant to 28 U.S.C. §§2201 and 2202, declaring Jacksonville City Ordinance Number 83-1200-647 (hereafter "Ordinance 83-1200-647") and Subchapter 13 of the Rules of the Duval County School Board (hereafter "Subchapter 13") to be invalid, unconstitutional, and null and void on their face and as applied, because the challenged provisions of the Jacksonville Ordinance and School Board Rule:

(1) violate the Fourteenth Amendment of the United States Constitution;
(2) violate 42 U.S.C. §1981; and
(3) deny rights protected by and enforceable under 42 U.S.C. §1983.

2. This action also seeks a temporary restraining order and preliminary injunction, enjoining and restraining Defendants, their successors in office, their agents, servants, employees, directors, and all persons acting in concert therewith or under their direction from: (1) setting aside, pursuant to Ordinance 83-1200-647 or Subchapter 13, any construction contracts for bidding by minority business enterprises ("MBEs") only; (2) attempting to require, pursuant to Ordinance 83-1200-647 or Subchapter 13, any contractor or subcontract a specified percentage of any construction contract to a MBE; (3) setting aside, pursuant to Ordinance 83-1200-647 or Subchapter 13, any contracts to be awarded for procurement of equipment, materials, supplies, and/or service contracts for bidding by MBEs only; and/or (4) from invoking or seeking enforcement of or taking any action whatsoever to apply Ordinance 83-1200-647 or Subchapter 13 against Plaintiff or any of the members of the Plaintiff.

JURISDICTION AND VENUE

3. This Court has subject matter jurisdiction of this action pursuant to 28 U.S.C. §1331(a) because the matter in controversy arises under the Constitution and laws of the United States.

4. This Court has subject matter jurisdiction of this action pursuant to 28 U.S.C. §1343(3) and (4) because these are civil claims seeking declaratory and injunctive relief to redress the deprivation, under color of state law, of rights, privileges and immunities secured by the Constitution and Acts of Congress protecting equal rights.

5. Venue in this district is proper pursuant to 28 U.S.C. §1391(b) because the claims arise in this district and also because the defendants reside and act in their respective official capacities in this district.

NATURE OF THE ACTION

6. This is a proceeding for a preliminary injunction to enjoin the Defendants from continuing to enforce the provisions, policies and regulations of Ordinance 83-1200-647 and Subchapter 13. It is also a proceeding for declaratory judgment to declare the legal rights and relations of the parties to this controversy.

7. Because of the gravity of the actual and threatened harm to Plaintiff and its members from the actual and threatened enforcement by Defendants of Ordinance 83-1200-647 and Subchapter 13 and regulations and procedures promulgated thereunder, Plaintiff seeks a speedy hearing of this case.

8. In view of the Defendants' actual enforcement of the aforesaid Ordinance 83-1200-647 and Subchapter 13 and regulations

promulgated thereto which require that certain percentages of City and School Board contracts be awarded to minority firms and Plaintiff's contention that such regulations and procedures are null and void, of no force and effect and unauthorized by law, or any law, regulation, administrative order whether by Ordinance 83-1200-647, Subchapter 13 or other legislative enactment, there is an actual controversy within the jurisdiction of this Court. A binding declaration by this Court will effectively adjudicate the rights of the parties. To delay further may result in thousands and millions of dollars of City and School Board contracts being ultimately found void at a subsequent date. Therefore, an immediate resolution and decision on this matter is necessary.

THE PARTIES

9. Plaintiff Northeastern Florida Chapter of the Associated General Contractors of America (hereinafter referred to as "AGC"), is a Florida corporation not-for-profit with its principal offices and place of business in Duval County, Florida. The AGC is organized for the purpose of furthering the interests of general contractors, subcontractors and suppliers in the construction industry. Plaintiff is a trade association which has membership comprised of, inter alia, 240 general contractors, subcontractors, suppliers, and associates many of whom regularly bid on and perform construction work for the City of Jacksonville and Duval County. Most of Plaintiff's members are not minority business enterprises as defined in §126.603 of the City of Jacksonville Purchasing Code or §13-3 of the Duval County School Board, such members of Plaintiff AGC are expressly excluded from bidding on construction contracts set aside by the City of Jacksonville or the Duval County School Board.

10. Defendant City of Jacksonville is a municipal corporation located in Duval County, Florida. Defendant exists under the authority of the laws of the State of Florida and at all times material to this cause was and is acting under color of state law.

11. Mr. Tommy Hazouri is the Mayor of the City of Jacksonville, and at all times material to this cause was and is acting under color of state law.

12. The Duval County School Board is a body corporate and politic existing under the authority of the laws of the State of Florida and at all times material to this cause was and is acting under color of state law.

13. Mr. Stan Jordan is the Chairman of the Duval County School Board, and at all times material to this cause was and is acting under color of state law.

THE JACKSONVILLE MINORITY BUSINESS ENTERPRISE ORDINANCE

14. The City Council of the City of Jacksonville enacted Ordinance Number 83-1200-647, a copy of which is included in the Appendix.

15. The stated purpose of Ordinance 83-1200-647 is to permit the City:

> ...to correct "past inequities and disparities" which have "disadvantaged Minority Business Enterprises in awarding of contracts by the City" and to address the fact that "Minority Business Enterprises have been disadvantaged in their participation in the general welfare of the City and in City

expenditures for service, supplies and materials."

In addition, "in the exercise by the City of its powers to make expenditures and to provide for the general welfare, to remedy such disadvantaged participation."

16. Following the enactment of Ordinance 83-1200-647 it was incorporated within §126.601, et. seq. of the City of Jacksonville Purchasing Code.

17. Pursuant to §126-603(a) of the Jacksonville Purchasing Code a minority business enterprise (MBE) is defined as:

> ...a commercial or industrial enterprise, at least fifty percent of which is owned by minority group members or by women or, in the case of a publicly-owned enterprise, at least fifty-one percent of the stock of which is owned by minority group members or by women.

18. Pursuant to §126.603(b) of the Jacksonville Purchasing Code the following persons are members of a minority group: black, Spanish-speaking American, Oriental, Indian, Eskimo, Aleut and handicapped.

19. Under the Jacksonville MBE program ten percent of the total amount appropriated for capital improvements during the fiscal year is set aside for minority business enterprises.

20. The City of Jacksonville, prior to the enactment of its MBE program or until this date, has not established that a racially based program is needed to remedy the effects of past racial discrimination in the City of Jacksonville.

THE DUVAL COUNTY SCHOOL BOARD MINORITY BUSINESS ENTERPRISE ORDINANCE

21. The School Board adopted a minority business enterprise participation plan in Subchapter 13 of the Rules of the Duval County School Board. The plan was adopted pursuant to the Board's rule making authority under Florida Statute §§230.03 and 230.22(2) and was implemented pursuant to Florida Statute §§235.31 and 287.094.

22. Section 13-2 of the MBE plan states that the Subchapter shall apply to all contracts funded in whole or in part by School Board funds, provided there be an exemption from the requirements of the Subchapter for any contract on which a minority business enterprise requirement is imposed by State or Federal law or otherwise supersedes or is prohibited by State or Federal law.

23. Section 13-4(a) of the School Board MBE plan provides that the Board's director for facilities planning shall set aside for minority business enterprises ten percent (10%) of the total amount appropriated for capital improvement to be awarded during each fiscal year, with certain adjustments.

24. Section 13-3(c) defines "minority business enterprise" ("MBE") as "a commercial or industrial enterprise, at least fifty percent of which is owned by minority group members or by women or, in the case of a publicly owned enterprise, at least fifty-one percent of the stock of which is owned by minority group members or by women."

25. Section 13-3(c) defines "minority group member" as "a person who is, or considers herself or himself to be, in one of the following classes as defined and described by the Equal Employment

Opportunity Commission: Black, Spanish-speaking American, Oriental, Indian, Eskimo, Aleut, and handicapped."

26. Section 13-6 of the School Board MBE plan provides that pre-qualification procedures and guidelines for an MBE shall be established and instituted by the director of the facilities planning and approved by the Board, with the director of facilities planning making the initial determination as to the pre-qualification of a minority business enterprise and whether it shall be admitted to the list of pre-qualified bidders. The plan further provides that an MBE that is denied pre-qualification shall have the right to appeal the denial to the School Board, whose decision shall be final.

27. Section 13-6(c) provides that the School Board, through its designee for bid evaluation, shall determine the amount of premium for the required performance bond, with the cost of that premium being paid for by the School Board.

28. Section 13-7 of the School Board MBE plan provides that an MBE awarded a contract under the plan shall make every endeavor to expend as much of the contract as possible for MBE subcontractors, with at least fifty percent of the contract required to be set aside for MBE contractors unless a greater or lesser percentage is specified in the invitation to bid or request for proposal.

29. Prior to the enactment and implementation of the School Board MBE set aside plan and until this date, the School Board has conducted no studies to determine whether or not there is a need to adopt racially based measures to remedy the effects of past racial discrimination within Duval County.

THE CITY OF JACKSONVILLE AND DUVAL COUNTY SCHOOL BOARD'S MINORITY BUSINESS PROGRAMS DO NOT HAVE AN ADEQUATE FACTUAL BASIS

30. By using an MBE set aside the City of Jacksonville and the Duval County School Board are engaged in a course of conduct which discriminates on the basis of race and ethnic origin among contractors, subcontractors and material suppliers bidding for projects.

31. The Defendants use racial and ethnic criteria for determining whether bids received for capital improvement projects are responsive.

32. Defendants do not have an adequate factual basis for their MBE programs. Because there is no evidence that there has been racial discrimination by the City of Jacksonville, Duval County, or others in the construction industry in Jacksonville and Duval County, the City of Jacksonville and the School Board do not have a compelling interest in the utilization of racial and ethnic criteria in the awarding of public contracts.

33. Prior to the filing of this action, Plaintiff, and Plaintiff's counsel, have inquired of Defendants as to the existence of any evidence of racial discrimination in Jacksonville or Duval County, either by the City or County, or by private individuals and firms, in the construction industry.

34. Prior to the filing of this action, Plaintiff's counsel advised Defendants Hazouri and Jordan, by letter dated February 28, 1989, that, in the opinion of counsel, and in light of the U.S. Supreme Court's recent decisions and other applicable authority, the current Jacksonville and School Board MBE programs were unconstitutional.

35. In response to a letter from a representative of Plaintiff, Mr. Daniel W. Haskell, Deputy Director of Central Services and Chief Purchasing Officer of the City of Jacksonville, and the individual responsible for administering the Jacksonville MBE program stated the following:

> "In response to your correspondence of February 2, 1989, please be advised that this office is not in possession of any documents that evidence or refer to any past racial or ethnic discrimination by the City of Jacksonville on projects let by the City of Jacksonville; nor any document which the City of Jacksonville contends establishes the basis for the need for a minority set aside program in construction work.
>
> As the official custodian of the records of the City of Jacksonville's Purchasing Division, I have access only to those records in my possession. The above response is in reply only to any records in my custody under the provisions of the Public Records Act."

36. Later in a memorandum dated March 21, 1989, to the Duval County School Board from Herb A. Sang, Superintendent of Schools, Mr. Sang recommended, "That the Duval County School Board consider a recommendation by General Counsel Jim Harrison that agencies of Consolidated City of Jacksonville temporarily discontinue current MBE Set Aside Programs pending results of a joint study on this matter."

37. To the extent that there may ever have been discrimination against members of a minority group, as defined by Ordinance 83-1200-647 or Subchapter 13, in the award of City or School Board contracts in the past, there is no evidence that the effects of that discrimination are continuing.

38. Subject to the ongoing investigation being conducted by the City of Jacksonville, there is no evidence that members of a minority group, as defined by Ordinance 83-1200-647 or Subchapter 13, have ever been discriminated against by the City of Jacksonville or the Duval County School Board.

39. Defendants have not conducted any inquiry into the existence of discrimination in the Jacksonville or Duval County construction industry.

40. In spite of continuing advice and recommendations to the contrary, Defendants City of Jacksonville and Duval County School Board, have adamantly refused to suspend their MBE programs pending studies to determine if a need for racially based programs exists with the City of Jacksonville and Duval County.

DEFENDANTS' MBE SET ASIDE PROGRAMS ARE NOT NARROWLY TAILORED TO REMEDY ANY PRIOR RACIAL DISCRIMINATION

41. The use by Defendants City of Jacksonville and the Duval County School Board of the figure "10%" in their racially-conscious contract award programs is arbitrary, in that the figure ten percent is not rationally related to any relevant statistic and does not reflect a percentage of any relevant population group.

42. The present imposition by the City of Jacksonville of race-conscious methods of awarding contracts in unlimited in time and, therefore, is not narrowly tailored to the elimination of any continuing effect of any prior discrimination but is, rather, simply a method of apportioning public funds among individuals and corporations along racial and ethnic lines.

43. The inclusion by the City of Jacksonville and the Duval County School Board in the race-conscious set aside program of racial and ethnic groups against whom no racial or ethnic discrimination has ever occurred in Jacksonville or Duval County makes the programs overly broad and demonstrates that they are not programs designed to remedy any continuing effects of any prior racial discrimination in Jacksonville or Duval County, but are, rather, simply a method of apportioning public funds among individuals and corporations along racial and ethnic lines.

COUNT ONE
THE SET ASIDE AND SUBCONTRACTING PROVISIONS OF THE JACKSONVILLE AND COUNTY SCHOOL BOARD MINORITY BUSINESS ENTERPRISE ORDINANCES VIOLATE THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

44. Plaintiff repeats and realleges paragraphs 1 through 43 of its Complaint as though fully set forth herein.

45. The Defendants, acting pursuant to the provisions of the Ordinance 83-1200-647 and Subchapter 13, have set side construction and procurement contracts and have restricted bidding on and awarding of such contracts to only MBEs.

46. Numerous non-minority members of Plaintiff AGC would have been eligible to, and would have, bid on such designated set aside contracts but for the restrictions imposed on such contracts by the Defendants pursuant to Ordinance 83-1200-647 and Subchapter 13.

47. The Defendants, acting pursuant to the provisions of

Ordinance 83-1200-647 and Subchapter 13, have required that all contractors awarded City or School Board construction contracts must subcontract at least ten percent (10%) of such contracts to MBEs, thus requiring members of Plaintiff to discriminate on account of race in awarding subcontracts on City and School Board general contracts.

48. Numerous non-minority members of Plaintiff have been damaged economically by being required to discriminate in the award of subcontracts so as to satisfy the 10% minority participation requirement.

49. Numerous non-minority members of Plaintiff AGC have been damaged by such actions of the Defendants because they have ben deprived of substantial economic and business opportunities by being precluded from bidding on and performing subcontracts for persons holding construction contracts who have been required to award such subcontracts to MBEs.

50. Enforcement by the Defendants of the minority set aside and subcontracting provisions of the Jacksonville and the School Board MBE ordinances have deprived, and will continue to deprive, numerous non-minority members of Plaintiff AGC of equal protection of the law in violation of the Fourteenth Amendment to the United States Constitution by requiring them to discriminate on the basis of race, and by discriminating against them on the basis of race.

51. Defendants, city and county officials acting under color of (city/state) law at all times relevant to this Complaint, have deprived numerous non-minority members of the Plaintiff of rights, privileges, and immunities secured by the Fourteenth Amendment to the United States Constitution and should therefore be enjoined, pursuant to 42 U.S.C. §§1981 and 1983, from such actions and deprivations.

52. Because of such constitutional deprivations, numerous non-minority members of the Plaintiff AGC have suffered, and will continue to suffer, irreparable harm and do not have an adequate remedy at law to terminate such discrimination and to recover the lost business opportunities and profits they have suffered and will continue to suffer because of said practices of the Defendants.

53. Unless restrained by this Court, Defendants will continue to enforce and administer Ordinance 83-1200-647 and Subchapter 13, as described in the preceding paragraphs.

COUNT TWO
THE JACKSONVILLE AND DUVAL COUNTY MINORITY BUSINESS ENTERPRISE ORDINANCE DISCRIMINATE ON THE BASIS OF RACE IN VIOLATION OF 42 U.S.C. §1981

54. Plaintiff repeats and realleges paragraphs 1 through 53 of its Complaint as though fully set forth herein.

55. Defendants, by applying and administering Ordinance 83-1200-647 and Subchapter 13, discriminate against numerous non-minority members of Plaintiff AGC on the basis of race thereby denying Plaintiff's members equal protection of the laws under the Fourteenth Amendment to the United States Constitution, and further violating rights protected under 42 U.S.C. §§1981 and 1983.

PRAYERS FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court grant the following relief:

a. Entry of a judgment declaring that Ordinance 83-1200-674,

Subchapter 13 and the rules and regulations promulgated thereunder are unconstitutional insofar as they are applied to deprive Plaintiff and others similarly situated of rights secured by the Constitution of the United States; and

b. A declaration that the administration and enforcement of Ordinance 83-1200-647 and Subchapter 13 by the Jacksonville City Council and the Duval County School Board violate Plaintiffs's rights under the Constitution and the laws of the United States and the State of Florida; and

c. Entry of a Temporary Restraining Order and/or a Preliminary Injunction prohibiting Defendants from placing any MBE goal on any City contracts, or form refusing to award such contract to a prime contractor whose bid is the lowest and best but fails to satisfy the MBE goal; and

d. Entry of a permanent injunction prohibiting the Defendants from enforcing Ordinance 83-1200-647 and/or Subchapter 13; and

e. Award to Plaintiff its costs and attorney fees pursuant to 42 U.S.C. §1988; and

f. Such other, further and additional relief as the Court may deem just and equitable.

RESPECTFULLY SUBMITTED this 4th day of April, 1989.

/s/
WILLIAM O. MILLER

/s/
G. STEPHEN PARKER
(Trial Counsel)

/s/
ROBERT B. BAKER
(Trial Counsel)

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/s/
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Attorneys for Plaintiff

VERIFICATION

I, Richard L. Hardy, declare that I am President of the Northeastern Florida Chapter of the Associated General Contractors of America and in such capacity am authorized to execute this verification on its behalf. I have read the above Complaint for Declaratory and Injunctive Relief and know its contents in the same is true and correct to the best of my personal knowledge, except as to those matters which are stated on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct and that this verification was executed this 4th day of April, 1989 at Jacksonville, Florida.

/s/
Richard L. Hardy, President
Northeastern Florida Chapter of
the Associated General Contractors
of America.

Sworn to and subscribed before
me this 4th day of April, 1989.

Connye V. Kennedy
Notary Public, State of Florida
My Commission Expires Oct. 18, 1992
Bonded through Notary Public Underwriters.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

NORTHEASTERN FLORIDA CHAPTER OF
THE ASSOCIATED GENERAL CONTRACTORS
OF AMERICA, a Florida Corporation
not for profit,

Case No. 89-278-Civ-J-16

Plaintiff,

v.

CITY OF JACKSONVILLE, FLORIDA, a
Florida Municipal Corporation;
TOMMY HAZOURI, in his official
capacity as Mayor of the City of
Jacksonville; THE DUVAL COUNTY
SCHOOL BOARD, a body corporate
and politic; and STAN JORDAN, in
his official capacity as Chairman
of the Duval County School Board,

Defendants.

ANSWER

The Defendants, City of Jacksonville, Florida, Tommy Hazouri, The Duval County School Board and Stan Jordan, hereby answer the Complaint for Declaratory and Injunctive Relief filed by the Plaintiff,

Northeastern Florida Chapter of the Associated General Contractor of America, as follows:

1. The allegations contained in paragraph (1) of the Complaint are admitted.

2. The allegations contained in paragraph (2) of the Complaint are admitted.

3. The allegations contained in paragraph (3) of the Complaint are admitted.

4. The allegations contained in paragraph (4) of the Complaint are admitted.

5. The allegations contained in paragraph (5) of the Complaint are admitted.

6. The allegations contained in paragraph (6) of the Complaint are admitted.

7. The allegations contained in paragraph (7) of the Complaint are denied and the Defendants further affirmatively assert that no actual or threatened harm has been or is being suffered by the Plaintiffs because of the enforcement of the subject Ordinance.

8. The allegations contained in paragraph (7) of the Complaint are denied and the Defendants further affirmatively assert that enforcement of the subject Ordinance will not result in damages to the Plaintiff nor will any contract of the Defendant be found void.

9. As to the allegations contained in paragraph (9) of the Complaint, the Defendants have no knowledge and the paragraph is therefore denied.

10. The allegations contained in paragraph (10) of the Complaint are admitted.

11. The allegations contained in paragraph (11) of the Complaint are admitted.

12. The allegations contained in paragraph (12) of the Complaint are admitted.

13. The allegations contained in paragraph (13) of the Complaint are admitted.

14. The allegations contained in paragraph (14) of the Complaint are admitted.

15. The allegations contained in paragraph (15) of the Complaint are denied and the Defendants further affirmatively assert that the subject Ordinance speaks for itself and the Court should determine its content, import and interpretation.

16. The allegations contained in paragraph (16) of the Complaint are admitted.

17. The allegations contained in paragraph (17) of the Complaint are admitted.

18. The allegations contained in paragraph (18) of the Complaint are admitted.

19. The allegations contained in paragraph (19) of the Complaint are admitted.

20. The allegations contained in paragraph (20) of the Complaint are denied and the Defendants further affirmatively assert that historic, extensive and identifiable instances of racial discrimination have existed in the City of Jacksonville, particularly in the construction industry. On the basis of this racial discrimination, the subject Ordinance is needed to remedy the present effects of racial discrimination in the City of Jacksonville.

21. The allegations contained in paragraph (21) of the Complaint are admitted.

22. The allegations contained in paragraph (22) of the Complaint are admitted.

23. The allegations contained in paragraph (23) of the Complaint are admitted.

24. The allegations contained in paragraph (24) of the Complaint are admitted.

25. The allegations contained in paragraph (25) of the Complaint are admitted.

26. The allegations contained in paragraph (26) of the Complaint are admitted.

27. The allegations contained in paragraph (27) of the Complaint are admitted.

28. The allegations contained in paragraph (28) of the Complaint are admitted.

29. The allegations contained in paragraph (29) of the Complaint are admitted as to all defendants, but a study is not a condition precedent to the enactment of the subject ordinances and rules.

30. The allegations contained in paragraph (30) of the Complaint are denied and the Defendants further affirmatively assert that they have not engaged in a course of conduct which discriminates because the subject ordinance is a constitutionally protected remedy.

31. The allegations contained in paragraph (31) of the Complaint are admitted.

32. The allegations contained in paragraph (32) of the Complaint are denied and the Defendants further affirmatively assert that they have a compelling interest in the implementation of the subject Ordinance based upon historic, extensive and identifiable instances of racial discrimination by elements in the construction industry in the City of Jacksonville.

33. As to the allegations contained in paragraph (33) of the Complaint, the Defendants have no knowledge and the paragraph is therefore denied, and the Defendants further affirmatively assert that the allegations are without relevancy.

34. As to the allegations contained in paragraph (34) of the Complaint, the Defendants have no knowledge and the paragraph is therefore denied, and the Defendants further affirmatively assert that the allegations are without relevancy.

35. The allegations contained in paragraph (35) of the Complaint are admitted.

36. The allegations contained in paragraph (36) of the Complaint are admitted.

37. The allegations contained in paragraph (37) of the Complaint are denied and the Defendants further affirmatively assert that extensive and identifiable instances of racial discrimination exist in the City of Jacksonville.

38. The allegations contained in paragraph (38) of the Complaint are denied and the Defendants further affirmatively assert that extensive and identifiable instances of racial discrimination exist in the City of Jacksonville.

39. The allegations contained in paragraph (39) of the Complaint are denied and the Defendants further affirmatively assert that examination has been made and awareness of identifiable instances of racial discrimination in the City of Jacksonville exists.

40. The allegations contained in paragraph (40) of the Complaint are denied and the Defendants further affirmatively assert that allegations are without relevancy.

41. The allegations contained in paragraph (41) of the Complaint are denied and the Defendants further affirmatively assert that they have compelling interest in remedying the present effects of racial discrimination in the City of Jacksonville and therefore the subject Ordinance is not arbitrary.

42. The allegations contained in paragraph (42) of the Complaint are denied and the Defendants further affirmatively assert that the subject Ordinance is intended as a temporary and remedial measure.

43. The allegations contained in paragraph (43) of the Complaint are denied.

44. The allegations contained in paragraph (44) of the Complaint are denied.

45. The allegations contained in paragraph (45) of the Complaint are denied.

46. The allegations contained in paragraph (46) of the Complaint are denied.

47. The allegations contained in paragraph (47) of the Complaint are denied and the Defendants further affirmatively assert that they have a compelling interest in remedying the present effects of racial discrimination in the City of Jacksonville and therefore the subject Ordinance is a constitutionally protected remedy.

48. The allegations contained in paragraph (48) of the Complaint are denied.

49. The allegations contained in paragraph (49) of the Complaint are denied.

50. The allegations contained in paragraph (50) of the Complaint are denied and the Defendants further affirmatively assert that they have a compelling interest in remedying the present effects of racial discrimination in the City of Jacksonville and therefore the subject

Ordinance is a constitutionally protected remedy.

51. The allegations contained in paragraph (51) of the Complaint are denied and the Defendants further affirmatively assert that they have a compelling interest in remedying the present effects of racial discrimination in the City of Jacksonville and therefore the subject Ordinance is a constitutionally protected remedy.

52. The allegations contained in paragraph (52) of the Complaint are denied and the Defendants further affirmatively assert that Plaintiffs will have an adequate remedy at law in the event they succeed in this litigation. On the other hand, the victims of racial discrimination will suffer irreparable harm in the event subject Ordinance is not enforced.

53. The allegations contained in paragraph (53) of the Complaint are denied and the Defendants further affirmatively assert that subject Ordinance will be implemented so long as it is necessary to remedy the present effect of racial discrimination in the City of Jacksonville.

54. The allegations contained in paragraph (54) of the Complaint are denied.

55. The allegations contained in paragraph (55) of the Complaint are denied and the Defendants further affirmatively assert that they have a compelling interest in remedying the present effects of racial discrimination in the City of Jacksonville and therefore the subject Ordinance is a constitutionally protected remedy.

Respectfully submitted,

JAMES L. HARRISON
GENERAL COUNSEL

/S/
STEVEN E. ROHAN, Trial Counsel
ASSISTANT COUNSEL
Florida Bar ID No. 138839

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ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to WILLIAM O. MILLER, ESQUIRE, G. STEPHEN PARKER, ESQUIRE, and ROBERT B. BAKER, ESQUIRE, Southeastern Legal Foundation, Inc., 2900 Chamblee-Tucker Road, Building 4, Atlanta, GA 30341; and to JOHN W. CAVEN, JR., ESQUIRE, Caven, Clark & Ray, P.A., 3306 Independent Square, One Independent Drive, Jacksonville, FL 32202, Attorneys for Plaintiff, by mail, this 28 day of April, 1989.

/S/
Attorney

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

NORTHEASTERN FLORIDA CHAPTER OF
THE ASSOCIATED GENERAL CONTRACTORS
OF AMERICA, a Florida Corporation
not for profit,

Plaintiff-Appellee,

v.

CITY OF JACKSONVILLE, FLORIDA, a
Florida Municipal Corporation;
TOMMY HAZOURI, in his official
capacity as Mayor of the City of
Jacksonville, Florida,

Defendants-Appellants.

CASE NO. 89-3410

March 2, 1990

Appeal from the United States District Court for the Middle District of Florida.

Before TJOFLAT, Chief Judge, EDMONDSON, Circuit Judge, and HILL, Senior Circuit Judge.

EDMONDSON, Circuit Judge:

This case involves review of a preliminary injunction prohibiting--on fourteenth amendment grounds--enforcement, until completion of a full trial to be held in the future, of a city ordinance that allocates a portion of municipal contracting dollars to businesses owned or controlled by members of minority groups. The ordinance, in pertinent part, sets aside ten percent of the amount appropriated by the City of Jacksonville for capital improvements and other construction contracts to be awarded to Minority Business Enterprises (MBEs). MBEs are enterprises which are more than fifty percent owned by women or members or designated minority groups. Plaintiff is a trade association; most of its members are not MBEs. Although we too question the ordinance's constitutionality, we reverse the grant of preliminary injunction because we believe that the district court abused its discretion in imposing such a drastic remedy in the circumstances and on the limited record before the court.

A preliminary injunction is a powerful exercise of judicial authority in advance of trial. The chief function of a preliminary injunction is to preserve the status quo until the merits of the controversy can be fully and fairly adjudicated. *Amer. Radio Ass'n v. Mobile Steamship Ass'n, Inc.*, 483 F.2d 1, 4 (5th Cir. 1973)[2]. Since 1984, the status quo in Jacksonville has been the existence of a municipal set-aside program. To justify a preliminary injunction, the plaintiff must plainly establish four preconditions: (1) a substantial likelihood that plaintiff will prevail on the merits, (2) a

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[2]In *Bonner v. City of Prichard*, 6161 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*), this court adopted as precedent all decisions of the former Fifth Circuit decided prior to October 7, 1981.

showing that plaintiff will suffer irreparable injury if an injunction does not issue, (3) proof that the threatened injury to plaintiff outweighs any harm that might result to the defendants, and (4) a showing that the public interest will not be disserved by grant of a preliminary injunction. *Cunningham v. Adams*, 808 F.2d 815, 819 (11th Cir. 1987); *Johnson v. United States Dep't of Agric.*, 734 F.2d 774, 781 (11th Cir. 1984). "The preliminary injunction is an extraordinary and drastic remedy not to be granted until the movant 'clearly carries the burden of persuasion' as to the four prerequisites. 'The burden of persuasion in all of the four requirements is at all times upon the plaintiff.'" *United States v. Jefferson County*, 720 F.2d 1511, 1519 (11th Cir. 1983) (quoting *Canal Authority of State of Florida v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974)); *accord Cunningham*, 808 F.2d at 819; *Zardui-Quintana v. Richard*, 768 F.2d 1213, 1216 (11th Cir. 1985).

In this country, democracy in government is, of course, viewed as a good and normal thing. When a federal court before trial enjoins the enforcement of a municipal ordinance adopted by a duly elected city council, the court overrules the decision of the elected representatives of the people and, thus, in a sense interferes with the processes of democratic government. Such a step can occasionally be justified by the Constitution (itself the highest product of democratic processes). Still, preliminary injunctions of legislative enactments--because they interfere with the democratic process and lack the safeguards against abuse or error that come with a full trial on the merits--must be granted reluctantly and only upon a clear showing that the injunction before trial is definitely demanded by the Constitution and by the other strict legal and equitable principles that restrain courts.

The district court found for plaintiff on each of the four preconditions for a preliminary injunction. We need not address each element because we conclude that no showing of irreparable injury was made. The plaintiff's "success in establishing a likelihood it will prevail on the merits does not obviate the necessity to show irreparable harm." *United States v. Lambert*, 695 F.2d 536, 540 (11th Cir. 1983) (affirming denial of preliminary injunction in environmental case); accord *Jefferson County*, 720 F.2d at 1520 n. 21.

"The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." *Sampson v. Murray*, 415 U.S. 61, 88, 94 S.Ct. 937, 952, 39 L.Ed.2d 166 (1974). A showing of irreparable harm is "the *sine qua non* of injunctive relief." *Frejlach v. Butler*, 573 F.2d 1026, 1027 (8th Cir. 1978). The injury must be "neither remote nor speculative, but actual and imminent". *Tucker Anthony Realty Corp. v. Schlesinger*, 888 F.2d 969, 973 (2d Cir. 1989). An injury is "irreparable" only if it cannot be undone through monetary remedies. The key word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." *Sampson*, 415 U.S. at 90, 94 S.Ct. at 953; *accord Jefferson County*, 720 F.2d at 1520.

The district court found that "a continuation of the MBE programs [would] result in an on-going violation of Plaintiffs' constitutional rights [which] ... by itself, is sufficient to show irreparable injury to the Plaintiffs." Order at 7. This is incorrect. No authority

from the Supreme Court or the Eleventh Circuit has been cited to us for the proposition that the irreparable injury needed for a preliminary injunction can properly be presumed from a substantially likely equal protection violation. In this case, no witnesses or other evidence was submitted on the issue of irreparable injury. The only area of constitutional jurisprudence where we have said that an on-going violation constitutes irreparable injury is the area of first amendment and right of privacy jurisprudence. *See, e.g., Cate v. Oldham,* 707 F.2d 1176, 1189 (11th Cir. 1983); *Deerfield Medical Center v. City of Deerfield Beach,* 661 F.2d 328, 338 (5th Cir. 1981). The rationale behind these decisions was that chilled free speech and invasions of privacy, because of their intangible nature, could not be compensated for by monetary damages; in other words, plaintiffs could not be made whole. The facts of this case do not fit the rationale of these decisions. This case involves neither a first amendment nor a right of privacy claim; and the damage to plaintiff here is chiefly, if not completely, economic.

Cunningham v. Adams, 808 F.2d 815 (11th Cir. 1987), concerned a claim of governmental racial discrimination in awarding contracts and a request for a preliminary injunction by the plaintiff. We concluded in *Cunningham* that, when the plaintiff's ultimate injury is that contracts will be awarded to someone else, plaintiff has failed to make a showing of irreparable injury. 808 F.2d at 821-22. As in *Cunningham,* if plaintiff is successful here, the court can direct the City to award municipal contracts to plaintiff's members who would have successfully bid for contracts in the absence of the set-aside program. Moreover, the City can award lost profits or other monetary damages to compensate a contractor that has been wrongfully denied a contract.

The district court also said that "financial hardship with difficult damage calculations *may* occur to the Plaintiffs if these programs continue to be implemented during the pendency of this lawsuit." Order at 7 (emphasis added). Nothing in the record, apart from a conclusory allegation of "irreparable harm" in the verified complaint and an assertion of speculative economic injury by plaintiff's counsel at the injunction hearing, supports the judge's finding of irreparable injury. Conjecture about a possibility of difficulties with damage computations is inadequate to support an injunction before trial. Because plaintiff presented no evidence on the issue, we cannot agree that irreparable injury is "apparent". In addition, that difficult damage calculations "may" occur is not enough. *See Sampson,* 415 U.S. at 88-89, 94 S.Ct. at 951-52. Furthermore, because no evidence was received, we may review the district court's observations on a clean slate and reach our own assessment of the nature of the injury. *See Mayo v. Lakeland Highlands Canning Co.,* 309 U.S. 310, 316, 60 S.Ct. 517, 520, 84 L.Ed. 774 (1940) ("The observations made in the course of the [trial court] opinion are not, in any proper sense, findings of fact upon these vital issues [irreparable injury]. Statements of fact are mingled with arguments and inferences for which we find no sufficient basis either in the affidavits or the oral testimony.").

The plaintiff association failed to bring forth representatives who could assert injury from the set-aside program. An association which gains standing by virtue of its membership cannot hide behind the associational structure. We expect that nonminority contractors can, by taking reasonable steps, quantify their claims for the purpose of seeking monetary relief from the City of a nonminority contractor has been improperly rejected in favor of a minority contractor. Put differently, that persons injured by the set-aside program cannot

obtain adequate relief by money damages and injunctive relief following a full trial is--from the record in this case--unclear. We conclude that plaintiff has failed to demonstrate irreparable injury entitling it to preliminary injunctive relief.

After *Richmond v. J. A. Croson*,[3] ____ U.S. ____, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989), we admit to doubts about whether the Jacksonville set-aside program can survive the strict scrutiny required by the Supreme Court. Nevertheless, keeping in mind the deference due to laws enacted by democratically elected local governments, we believe that the district court should have developed a more complete record on which to evaluate the circumstances in which the Jacksonville ordinance was passed and the consequences of immediate judicial action in advance of a full and fair trial. The present record is inadequate--especially in irreparable injury--to warrant the extraordinary remedy of preliminary injunction. Because no necessity for an injunction has been shown, we REVERSE the issuance of a preliminary injunction and REMAND for an expedited trial or other disposition on the merits.

TJOFLAT, Chief Judge, specially concurring:

I concur in the judgment of the court. I agree with the court that plaintiff has not made a showing of irreparable injury sufficient to support injunctive relief. In my view, however, the plaintiff-association's failure to allege with particularity that its members suffered injury, actual or threatened, should end the inquiry at an earlier point: the plaintiff-association lacks standing to sue.[1] On this issue, I adhere to the position developed more fully in my dissent in *Sims v. Florida Dep't of Highway Safety and Motor Vehicles*, 862 F.2d 1449, 1464-68 (11th Cir.) (en banc), *cert. denied*, ____ U.S. ____, 110 S.Ct. 64, 107 L.Ed.2d 31 (1989).[2]

An association, such as the Northeastern Florida Chapter of the Association of General Contractors of America (plaintiff), may, under certain circumstances, have standing to litigate its members' claims. *See Warth v. Seldin*, 422 U.S. 490, 498-99, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975). A prerequisite of representative standing, however, is that the members would have standing in their own right were they to bring suit themselves, *see Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343-45, 97 S.Ct. 2434, 2441-42, 53 L.Ed.2d 383 (1977), and to have standing in their own right, the members would have to show that they have suffered (or will suffer) an actual (or threatened) injury, *see Valley Forge Christian College v. Americans United for Separation of Church and*

---

[3]*Croson* was not a preliminary injunction case.

[1]A federal court is required to consider the question of standing whether or not it is raised by the parties: "A threshold question in every federal case is whether the plaintiff has made out a justiciable case or controversy within the meaning of article III." *Church of Scientology Flag Serv. Org. v. City of Clearwater*, 777 F.2d 598, 606 (11th Cir. 1985), *cert. denied*, 476 U.S. 1116, 106 S.Ct. 1973, 90 L.Ed.2d 656 (1986). This requires that in every case "the minimum constitutional standing requirements be demonstrated." *Id.*

[2]The *Sims* court ignored Supreme Court pronouncements on representative standing. It held cursorily that a plaintiff-association could litigate on behalf of its members but did not address the plaintiff's failure to allege that any of its members suffered actual or threatened injury. *Sims*, 862 F.2d at 1459.

State, 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982). As the Supreme Court stated in *Warth*, affirming the dismissal of a home builders' association's complaint on the ground that the association lacked standing:

> The complaint refers to no specific project of any of its members that is currently precluded either by the ordinance or by respondents' actions in enforcing it. There is no averment that any member has applied to respondents for a building permit or a variance with respect to any current project. . . . In short, ... Home Builders has failed to show the existence of any injury to its members of sufficient immediacy and ripeness to warrant judicial intervention.

Warth, 422 U.S. at 516, 95 S.Ct. at 2214.

In the current case, plaintiff's complaint alleges that nonminority members "would have been eligible to, and would have, bid" on contracts set aside for minority business enterprises. The complaint fails, however, to identify any member who was not allowed to bid on a particular project or to plead facts tending to establish that member's eligibility to bid. Nor does the complaint refer to any specific contract or subcontract that would have been awarded to a nonminority bidder but for the set-aside ordinance. it is the plaintiff's responsibility clearly to allege particular facts that demonstrate its standing, *see id.* at 518, 95 S.Ct. at 2215, and it is not the role of this court "to speculate concerning the existence of standing nor to [infer] support for the plaintiff," *Anderson v. City of Alpharetta*, 770 F.2d 1575, 1582 (11th Cir. 1985). Although it is a close question, I conclude that, under *Warth*, plaintiff did not fulfill its responsibility of establishing the standing of its individual members and therefore

lacks representative standing to litigate its members' claims. *See City of Alpharetta*, 770 F.2d at 1582-83 (organization lacked standing to challenge statute that forestalled development of low-income housing because organization failed to allege facts demonstrating with particularity that any individual had sought or would seek housing in area of project).

Accordingly, I concur in the judgment of the court reversing the district court's issuance of a preliminary injunction but do so because the plaintiff failed to establish its standing to challenge the set-aside ordinance.

Opinion, United States District Court
for the Middle District of Florida,
Jacksonville Division, rendered May 31, 1990 .... Pet. App.*

Opinion, United States Court of Appeals
for the Eleventh Circuit,
rendered January 28, 1992 ..... Pet. App. *

City of Jacksonville, Fla. Purchasing Code
§§ 126.601-126.611 (1984),
as amended (1988) ..... Pet. App. *

* These documents were printed in the Appendix to the Petition for Writ of Certiorari and, pursuant to Rule 26.1 of the Rules of this Court, are not reproduced in this Joint Appendix.

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No. 91-1721

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

NORTHEASTERN FLORIDA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA,
Petitioner,

v.

CITY OF JACKSONVILLE, FLORIDA and ED AUSTIN, in his official capacity as Mayor of the City of Jacksonville,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF PETITIONER

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QUESTION PRESENTED FOR REVIEW

Whether an association challenging a racially exclusive government ordinance may establish standing by showing that its members are treated unequally in the bidding process for certain municipal contracts, or whether the association must show that its members actually would have received one or more of those contracts absent the ordinance?

LIST OF INTERESTED PARTIES

The Petitioner, Northeastern Florida Chapter of the Associated General Contractors of America, and the Respondent, City of Jacksonville, Florida, were parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit. The Mayor of the City of Jacksonville who was included in the appellate court proceedings, Tommy Hazouri, is no longer mayor of the City. Pursuant of Rule 35.3 of the Rules of this Court, AGC has substituted the current mayor, Ed Austin, in the caption of this case.

None of the parties has any parent companies or subsidiaries. Petitioner is affiliated with the Associated General Contractors of America, a non-profit corporation.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

LIST OF INTERESTED PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES . . . 2

STATEMENT OF THE CASE 4

SUMMARY OF ARGUMENT 7

ARGUMENT 8

I. AGC's Allegations that the Jacksonville Ordinance Mandated Unequal Treatment in the Bidding Process for Non-minority AGC Members Identified Sufficient Injury to Establish AGC's Standing to Challenge the Ordinance. 8

A. The City Excluded AGC Members from Equal Competition for City Contracts. 10

B. Unequal Treatment, Not Denial of Benefits, Establishes Sufficient Injury under the Equal Protection Clause. 12

C. The Eleventh Circuit's Rule is Based Upon a Misunderstanding of this Court's Precedent. 19

D. The Eleventh Circuit's Rule Would Twist Principles of Constitutional Review Beyond Recognizable Parameters. 22

E. AGC's Allegations Establish Sufficient Facts to Sustain Standing in this Case. 26

II. Even if AGC Must Indentify a Specific Contract to Establish Standing, the Eleventh Circuit Erred in Dismissing Rather than Remanding This Case. 28

CONCLUSION 31

TABLE OF AUTHORITIES

CASES

Allen v. Wright, 468 U.S. 737 (1984) 8-10, 19

Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522 (1959) 17

Ass'n of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970) 13

Baker v. Carr, 369 U.S. 186 (1962) 10, 15

Califano v. Goldfarb, 430 U.S. 199 (1977) 17

City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 373 (1985) 22

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 6, 22, 27

Cone Corp. v. Florida DOT, 921 F.2d 1190 (11th Cir.), *cert. denied*, __ U.S. __, 111 S.Ct. 2238 (1991) 19, 23, 25

Craig v. Boren, 429 U.S. 190 (1976) 17

Flast v. Cohen, 392 U.S. 83 (1968) 13

Gladstone Realtors v. Village of Bellwood,
441 U.S. 91 (1979) 12, 29

Harris v. McRae, 448 U.S. 297 (1980) 14

Havens Realty Corp. v. Coleman,
455 U.S. 363 (1982) 29

Heckler v. Mathews, 465 U.S. 728 (1984) 14, 17

*Hunt v. Washington State Apple
Advertising Comm'n*, 432 U.S. 333 (1977) 8, 25

In re: Griffiths, 413 U.S. 717 (1973) 15

*International Primate Protection League v.
Administrators of Tulane Educational Fund*,
__ U.S. __, 111 S.Ct. 1700 (1991) 13

Iowa-Des Moines Nat'l Bank v. Bennett,
284 U.S. 239 (1931) 17

Lassiter v. Northampton County Bd. of Elections,
360 U.S. 45 (1959) 22

Lucas v. South Carolina Coastal Council,
__ U.S. __, 112 S.Ct. 2886 (1992) 29

Lujan v. Defenders of Wildlife,
___ U.S. ___, 112 S.Ct. 2130 (1992) 9, 13, 27, 29

Lujan v. National Wildlife Federation,
497 U.S. 871 (1990) 30

Maryland Highway Contractors v. State of Maryland,
933 F.2d 1246 (4th Cir.), *cert. denied*, __ U.S. __,
112 S.Ct. 373 (1991) 19

Michigan Road Builders Ass'n, Inc. v. Blanchard,
761 F. Supp. 1303 (W.D. Mich. 1991) 19

Northeastern Fla. Chapter v. City of Jacksonville,
896 F.2d 1283 (11th Cir. 1990), *appeal after remand*,
951 F.2d 1213 (11th Cir.), *cert. granted*,
60 U.S.L.W. 3783 (U.S. October 5, 1992)
(No. 91-1721) 5

Northeastern Florida Chapter v. City of Jacksonville,
951 F.2d 1217 (11th Cir.), *cert. granted*,
60 U.S.L.W. 3783 (U.S. Oct. 5, 1992)
(No. 91-1721) 6, 8, 9

Orr v. Orr, 440 U.S. 268 (1979) 16

Pennell v. City of San Jose,
485 U.S. 1 (1988) 12, 23, 27

Powers v. Ohio, ___ U.S. ___,
111 S.Ct. 1364 (1991) 14

Quinn v. Millsap, 491 U.S. 95 (1989) 22

Regents of California v. Bakke,
438 U.S. 265 (1978) 15, 16, 25

Schlesinger v. Reservists Committee to Stop the War,
418 U.S. 208 (1974) 21

Stanton v. Stanton, 421 U.S. 7 (1975) 17

Turner v. Fouche, 396 U.S. 346 (1970) 14

U.S. v. SCRAP, 412 U.S. 669 (1973) 30

*Underground Contractors Ass'n v. Metropolitan
Water Reclamation District of Greater Chicago*,
No. 90-C-3586 (unpublished)
(N.D. Ill. July 10, 1991) 19

*Valley Forge Christian College v.
Americans United for Separation of
Church and State*, ~~Inc., 454 U~~.S. 464 (1982) 13

Warth v. Seldin, 422 U.S. 490 (1975) . 10-13, 19, 21, 26-28

Washington v. Davis, 426 U.S. 229 (1976) 14

Wengler v. Druggists Mutual Ins. Co.,
446 U.S. 142 (1980) 15

Wygant v. Jackson Bd. of Education,
476 U.S. 267 (1986) 22

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. Art. III, Sec. 2 2

U.S. Const., Amend. XIV, Sec. 1 2

42 U.S.C. § 1983 3

Jacksonville Purchasing Code § 126.601, *et seq.* 3, 4

SECONDARY AUTHORITIES

Fletcher, *The Structure of Standing*,
98 Yale L.J. 221 (1988) 13

Howard, Remarks of; Cong. Globe,
39th Cong., 1st Sess., 2766 (1866) 14

OPINIONS BELOW

The Eleventh Circuit's opinion is reported at 951 F.2d 1217 (11th Cir. 1992), and is reproduced in the Appendix to the Petition for Writ of Certiorari ("Petition Appendix") at App. 1. The district court's judgment and opinion is not reported, but is reproduced in the Petition Appendix at App. 7.

JURISDICTION

Petitioner brought this action in the United States District Court for the Middle District of Florida pursuant to 42 U.S.C. § 1983. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291, and entered its judgment on January 28, 1992. *See* 951 F.2d 1217 and Petition Appendix at App. 1.

Petitioner timely filed the petition for writ of certiorari in accordance with Rule 13 of the Rules of this Court, and invoked jurisdiction pursuant to 28 U.S.C. § 1254(1). This Court granted certiorari on October 5, 1992.

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. Art. III, Sec. 2:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; -- to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const., Amend. XIV, Sec. 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 Civil Action for Deprivation of Rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

City of Jacksonville, Fla. Purchasing Code §§ 126.601-126.611 (1984), *as amended* (1988).

The relevant ordinances are lengthy and, pursuant to Rules 24.1(f) and Rule 26.1 of the Rules of this Court, are set out in the Petition Appendix at App. 14.

STATEMENT OF THE CASE

Petitioner, Northeastern Florida Chapter of the Associated General Contractors of America [hereinafter "AGC"], is an association of persons and firms in the construction industry doing business in Jacksonville and Duval County, Florida. Petitioner brought this suit on April 4, 1989, pursuant to 42 U.S.C. § 1983, challenging, both facially and as applied, the Minority Business Enterprise Programs administered by the City of Jacksonville [hereinafter "the City"][1]. Complaint, Record Vol. 1, Doc. 1 ["R-1-1"], ¶¶ 1, 50-51; Joint Appendix at JA-8, 19.

The City Minority Business Enterprise ["MBE"] program requires that ten percent of the amount budgeted for city contracts be set aside for firms characterized as MBE's. Jacksonville Purchasing Code ["City Code"] § 126.604 (capital improvements contracts), § 126.605 (other contracts); R-1-5, Exh. A; Petition Appendix at App. 15-21. The program, as amended, defines a minority business as one owned at least 51% by a minority group member or a woman. City Code § 126.603(a)' R-1-5, Exh. A; Petition Appendix at App. 15.

The city's chief purchasing officer earmarks contracts for bidding by MBE's. The ordinance specifies that the amount of the set-aside, with the Mayor's approval "shall be deemed reserved for minority business enterprises only, and the projects shall be awarded directly to minority business enterprises." City Code § 126.604(c), § 126.605(c); R-1-5, Exh. A. Petition

[1] AGC also named as defendants the Duval County School Board and its Chairman. After the district court enjoined enforcement of the programs, the school board suspended its programs and has not been a party to any of the subsequent proceedings.

Appendix at App. 18, 21.

AGC's members are primarily non-minorities within the meaning of the challenged programs. Petitioner's Complaint for Declaratory and Injunctive Relief ["Complaint"], R-1-1, ¶ 9; Joint Appendix at JA-10. With the exception of those members who are women, handicapped, or members of one of the defined racial groups, AGC's members are unable to compete for the contracts that the City sets aside for MBE firms. R-1-1, ¶ 9; Joint Appendix at JA-10.

On the same day as it filed suit, April 4, 1989, AGC moved for a temporary restraining order and a preliminary injunction. R-1-2 & -3. On April 6, 1989, the district court entered a temporary restraining order prohibiting future implementation of the challenged MBE ordinance. R-1-9. After a hearing, the district court on April 20, 1989, granted a preliminary injunction. R-2-27.

The City appealed the district court's order, R-2-32, and the Eleventh Circuit Court of Appeals reversed. *Northeastern Fla. Chapter v. City of Jacksonville*, 896 F.2d 1283 (11th Cir. 1990); R-3-52; Jt. Appendix at 34. The appellate court did not rule on the issue of standing, although Chief Judge Tjoflat expressed in a concurring opinion his belief that AGC lacked standing to bring suit. *Id.* The Eleventh Circuit issued its order on March 2, 1990, *id.*, and the mandate issued on April 6, 1990. R-3-52.

During the year between the district court's grant of the preliminary injunction and the Eleventh Circuit's reversal of that injunction, the parties continued to pursue this case. On June 10, 1989, the City filed a motion for judgment on the pleadings, or in the alternative, summary judgment. AGC responded to that motion, and filed a cross-motion for summary judgment on

October 20, 1989.

After the Eleventh Circuit issued its opinion in the first appeal, and before trial, the district court on May 31, 1990, granted the plaintiff's motion for summary judgment and denied the defendants' motion. R-3-69; Petition Appendix at App. 7. The district court found that the City's program failed to meet the criteria that this Court established in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). *Id.* After the trial court granted AGC's motion for attorneys' fees, the City appealed once again. R-3-78.

The Eleventh Circuit Court of Appeals did not reach the merits of the City's program, but ordered the case dismissed without prejudice for lack of standing. *Northeastern Florida Chapter v. City of Jacksonville*, 951 F.2d 1217 (11th Cir.), *cert. granted*, 60 U.S.L.W. 3783 (U.S. Oct. 5, 1992) (No. 91-1721); R-4-81; Petition Appendix at App. 6. The court held that AGC lacked standing because it had not shown "that, but for the [MBE] program, any AGC member would have bid successfully for any of [the City's] contracts." *Id.*, 951 F.2d at 1219; Petition Appendix at App. 5.

This Court granted certiorari on October 5, 1992. Little more than three weeks later, on October 28, 1992, the City of Jacksonville enacted a new statutory scheme replacing the code section that AGC challenged in 1989. The text of those ordinances is before this Court as part of Respondent's Motion to Dismiss as Moot. Because of time constraints, Petitioner is unable to address that Motion in this brief. As explained in Petitioner's Response to the Motion, however, the new ordinances do not affect the issues to be decided by this Court on this petition.

SUMMARY OF ARGUMENT

AGC's complaint alleges that the City of Jacksonville excluded non-minority AGC members from the bidding process for a portion of the contracts that the City awarded. These allegations are sufficient, at least at the pleading stage, to establish that the City treats AGC members differently from other bidders in awarding certain contracts. Unequal consideration for participation is sufficient injury to establish standing under the equal protection clause. Requiring proof of a specific lost contract contravenes this Court's precedent and distorts the long-recognized parameters of constitutional-based challenges.

Even if the Eleventh Circuit was correct in requiring evidence of specific contracts lost because of the City's ordinance, it erred in dismissing the case. According to this Court's prior decisions, the proper procedure in this case was for the appellate court to remand for further factual development.

ARGUMENT

Standing to bring a suit in federal court is governed by the "case or controversy" requirement of the U.S. Constitution, Art. III, § 2. Part of the separation of powers doctrine, *Allen v. Wright*, 468 U.S. 737, 752 (1984), standing is an important question for federal courts. Recognition of the courts' restrained role in American government, however, neither requires, nor justifies the mechanical rule that the Eleventh Circuit Court of Appeals has established. Plaintiffs challenging government contract preferences on equal protection grounds should not be barred from the courthouse because they do not prove that they are entitled to government contracts. Simply being precluded from equal competition is sufficient injury to establish standing.

I. AGC's Allegations that the Jacksonville Ordinance Mandated Unequal Treatment in the Bidding Process for Non-minority AGC Members Identified Sufficient Injury to Establish AGC's Standing to Challenge the Ordinance.

An association such as AGC has standing to bring suit whenever (1) one or more of its members would have standing; (2) the interests it seeks to protect are germane to its purposes; and (3) neither the claim nor the relief requested requires participation of individual members in the lawsuit. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). The Eleventh Circuit ordered the case dismissed because, according to its new rule, AGC had not shown that one or more of its members would have standing. *Northeastern Florida Chapter*, 951 F.2d at 1219; Petition Appendix at App. 4. Neither

the City nor the lower courts have disputed AGC's standing on any other grounds.

To establish individual standing, a individual plaintiff must allege the three elements that comprise "the irreducible constitutional minimum." *Lujan v. Defenders of Wildlife*, ___ U.S. ___, 112 S.Ct. 2130, 2136 (1992). Those requirements are: (1) that the plaintiff suffer an "'injury in fact' -- an invasion of a legally-protected interest which is (a) concrete and particularized; and (b) 'actual or imminent, not "conjectural" or "hypothetical"'"; (2) that there be a causal connection between the injury and the challenged conduct; and (3) that it is likely that the injury will be redressed by a favorable decision. *Id.* (citations omitted); *Allen v. Wright*, 468 U.S. at 751.

In the instant case, the Eleventh Circuit found that AGC failed to meet the first requirement of concrete, specific injury. *Northeastern Florida Chapter*, 951 F.2d at 1219-20; Petition Appendix at App. 5-6. The court specifically deemed it unnecessary to consider the other two components of standing.[2] *Id.*, 951 F.2d at 1220; Petition Appendix at App. 6.

The Eleventh Circuit decided that AGC had not established injury-in-fact because it had not alleged that AGC members "would have bid more successfully on any one or more

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[2] Nor would a remand be necessary for either the appellate court or the district court to consider those two components. If this Court recognizes unequal treatment in the bidding process as sufficient injury to establish standing in this case, there certainly is a causal connection between that injury and the ordinance that mandates the discrimination. Similarly, whenever such ordinances are enjoined, the injury of unequal treatment is redressed. Thus, the latter two components of standing flow automatically from the first.

of these contracts [set aside for MBEs] if not for the ordinance." *Id.*, 951 F.2d at 1219; Petition Appendix at App. 6. Petitioner has never disputed this summary of the record. AGC did not present evidence that any of its members lost a contract due to the City's ordinance, mainly because no such evidence was required until the second appeal of this case, after the record was closed.

AGC simply contends that such evidence of a specific lost contract is not required because its complaint establishes the long-recognized injury of unequal government treatment. The restrictive rule adopted by the Eleventh Circuit and at least five other federal courts is based on a misunderstanding of AGC's claims, this Court's precedent, and the principles that govern standing in equal protection cases.

A. The City Excluded AGC Members from Equal Competition for City Contracts.

Standing is one of several doctrines that has grown around the "case or controversy" requirement of Article III of the Constitution. Although it does not lend itself to a precise definition, standing is not an unusually complicated principle. At its core is the requirement that the plaintiff allege "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962). *See also*, *Warth v. Seldin*, 422 U.S. 490, 499 (1975) ("the plaintiff himself" must suffer a threatened or actual injury). Put more simply, "the particular plaintiff [must be] entitled to an adjudication of the particular claims asserted." *Allen v. Wright*,

468 U.S. at 752.

In this case, AGC alleged a concrete and definable injury to its members. Petitioner is not a bystander complaining about a "generalized grievance," *Warth*, 422 U.S. at 499, of perceived injustice. AGC's members are directly affected by the City's ordinances restricting certain contracts to certain companies.

AGC's verified complaint establishes that the City of Jacksonville excludes non-minority AGC members from the bidding process for 10% of the contracts that the City awards. AGC members "regularly bid on and perform construction work for the City of Jacksonville." Complaint, ¶ 9; R-1-1, Joint Appendix at JA-10. However, "such members of Plaintiff AGC are expressly excluded from bidding on construction contracts set aside by the City of Jacksonville." *Id.* Furthermore, "[n]umerous non-minority members of AGC would have been eligible to, and would have, bid on such designated set aside contracts but for the restrictions imposed on such contracts by the Defendants." *Id.*, ¶ 46; R-1-1, Joint Appendix at JA-18.

The City challenged none of these allegations during the course of the district court proceedings. *Compare* Plaintiff's Statement of Material Facts as to Which There Exists No Genuine Issue, R-2-38, ¶¶ 3-8, *and* Defendants' Response and Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, R-2-41, p. 2. AGC was prepared to present testimony supporting its allegations, R-1-11, but the district court denied that motion. R-1-12. The district court accepted AGC's allegations as settled. *See, e.g.*, Order Granting Plaintiff's Motion for Summary Judgment, R-3-69; Petition Appendix at App. 8, 10.

When, as here, standing must be decided largely on the pleadings, the Court should "accept as true all material allegations

of the complaint, and . . . construe the complaint in favor of the complaining party." *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 109 (1979), *quoting Warth*, 422 U.S. at 501. So construed, Petitioner's complaint establishes that its non-minority members regularly bid on and perform construction work for the City of Jacksonville, but are excluded from certain city contracts because of their race. *Cf.*, *Pennell*, 485 U.S. at 8 (plaintiff association had standing where complaint alleged that ordinance would be enforced against members). AGC members thus are "proper part[ies] to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." *Warth*, 422 U.S. at 518.

The Eleventh Circuit ignored Petitioner's allegations, and looked instead for a specific lost contract. AGC, however, sued not because of any lost contracts, but because of the City's unequal bidding standards. Petitioner came into federal court under the umbrella of the equal protection clause, Complaint ¶ 50; R-1-1, Joint Appendix at JA-19, which encompasses much more than the loss of specific contracts. By treating this case as simply a suit for lost contracts, the circuit court overlooked, and consequently eviscerated, the principles of standing in equal protection cases.

B. Unequal Treatment, Not Denial of Benefits, Establishes Sufficient Injury under the Equal Protection Clause.

Although plaintiffs in all federal court cases must establish injury in order to have standing to sue, the type of injury required may vary according to the constitutional or statutory provisions at

issue. "Standing does not refer simply to a party's capacity to sue in court. Rather, standing is gauged by the specific common-law, statutory, or constitutional claims that a party presents." *International Primate Protection League v. Administrators of Tulane Educational Fund*, __ U.S. __, 111 S.Ct. 1700, 1704 (1991). Standing "should be seen as a question of substantive law, answerable by reference to the statutory and constitutional provision whose protection is invoked." Fletcher, *The Structure of Standing*, 98 Yale L.J. 221, 229 (1988) (quoted with approval by this Court in *Int'l Primate Protection League*, *supra*).

Reference to the specific constitutional claims in a case does not invoke a "'sliding scale' of standing" that relaxes the Article III requirements for certain privileged cases. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 484 (1982). In that sense, standing "focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *Flast v. Cohen*, 392 U.S. 83, 99 (1968).

Once the focus is on the plaintiff, however, he or she must show an injury protected by the constitutional provision at issue. "Although standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal, it often turns on the nature and source of the claim asserted." *Warth*, 422 U.S. at 500. *See also*, *Ass'n of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970) (standing concerns "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question"). *Cf.*, *Lujan*, 112 S.Ct. at 2137 ("desire to use or observe an animal species, even for purely aesthetic purposes, is undeniably a cognizable interest for purpose of standing"). The

constitutional protection that the plaintiff claims will not alter the rules of standing, but it will establish the parameters for defining the requisite injury.

In the instant case, Petitioner invoked the protection of the equal protection clause. That clause, as this Court has made clear in numerous cases, protects against government discrimination, not denial of benefits. "The right to equal treatment guaranteed by the Constitution is not coextensive with any substantive rights to the benefits denied the party discriminated against." *Heckler v. Mathews*, 465 U.S. 728, 739 (1984). "The guarantee of equal protection under the Fifth Amendment is not a source of substantive rights or liberties, but rather a right to be free from invidious discrimination in statutory classifications and other governmental activity." *Harris v. McRae*, 448 U.S. 297, 322 (1980). *Cf.*, *Washington v. Davis*, 426 U.S. 229, 239 (1976) (central purpose of the equal protection clause is the prevention of discriminatory official conduct); Remarks of Sen. Howard, Cong. Globe, 39th Cong., 1st Sess., 2766 (1866) (fourteenth amendment "does away with the injustice of subjecting one caste of persons to a code not applicable to another").

This Court recently underscored that principle in *Powers v. Ohio*, __ U.S. __, 111 S.Ct. 1364 (1991). The Court held that a criminal defendant might object to race-based peremptory challenges even if the defendant was not of the same race as the excluded jurors, and noted the equal protection rights of those jurors. "An individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race." *Id.* at 1370. *See also*, *Turner v. Fouche*, 396 U.S. 346, 363 (1970) (plaintiffs "have no right to be appointed to the . . . board of education, [but they] do have a federal constitutional right to be considered for public

service without the burden of invidiously discriminatory disqualifications").

Consistent with its restrained view of the equal protection clause, this Court has consistently held that the injury required for standing is simply unequal treatment, not the loss of any particular government benefit. *See, e.g.*, *Baker v. Carr*, 369 U.S. at 208 ("It would not be necessary to decide whether appellants' allegations of impairment of their votes by the 1901 apportionment will, ultimately, entitle them to any relief, in order to hold that they have standing to seek it. If such impairment does produce a legally cognizable injury, they are among those who have sustained it"). *Cf.*, *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 147-49 (1980) (widower challenged denial of workers' compensation benefits; Court found law discriminated against women as well as men); *In re: Griffiths*, 413 U.S. 717 (1973) (resident alien challenged rule restricting bar examination to U.S. citizens; question never raised of ability to pass if allowed to sit for test).

This Court specifically considered the issue of unequal treatment as a basis for standing in *Regents of California v. Bakke*, 438 U.S. 265 (1978). The plaintiff was a white male whose application to a state medical school was rejected. He challenged the legality of the school's special admission program under which 16 of 100 positions in the class were reserved for minority students, several of whom were admitted with qualifications that were lower than his.

Although the school did not raise the issue of standing in the trial court or court of appeals, several *amici curiae* argued that Bakke lacked standing to bring the lawsuit. *Id.*, 438 U.S. at 281, n. 14. They argued that he had not shown that his injury, exclusion from medical school, would be redressed by a favorable

decision. Justice Powell, in a portion of the opinion not disputed by any other Justices, stated,

> even if Bakke had been unable to prove that he would have been admitted in the absence of the special program, it would not follow that he lacked standing. The constitutional element of standing is plaintiff's demonstration of any injury to himself that is likely to be redressed by favorable decision of his claim. The trial court found such injury, apart from failure to be admitted, *in the University's decision not to permit Bakke to compete for all 100 places in the class, simply because of his race.* Hence, the constitutional requirements of Art. III were met. The question of Bakke's admission *vel non* is merely one of relief.

Bakke, 438 U.S. at 281, n.14 (citations omitted, emphasis added). Like Bakke, non-minority AGC members are not allowed to compete for 100% of the City's contracts. Whether they would have received one of the contracts is a question of relief, not standing.

This Court consistently has found standing even when there was no guarantee that the person challenging a government policy would benefit from a change in that policy. In *Orr v. Orr*, 440 U.S. 268 (1979), this Court held that a male plaintiff had standing to challenge an Alabama law requiring husbands, but not wives, to pay alimony. The Court recognized that Alabama could respond to a successful challenge of its law by denying alimony to both husbands and wives. Nevertheless, Mr. Orr had standing: "There is no question that Mr. Orr bears a burden he would not bear were he female. . . . The burden alone is sufficient to

establish standing." *Id.*, 440 U.S. at 273. *Cf.*, *Craig v. Boren*, 429 U.S. 190, 210 n. 24 (1976) (different legal drinking ages for males and females violated equal protection; legislature free to redefine any age for purchase of beer, so long as law is gender-neutral); *Stanton v. Stanton*, 421 U.S. 7, 17 (1975) (plaintiff, "although prevailing here on the federal constitutional issue, may or may not ultimately win her lawsuit"); *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1959) (corporation challenged rule that taxed domestic corporations on stored property, but exempted merchandise belong to non-residents); *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 247 (1931) ("The right invoked is that to equal treatment; and such treatment will be attained if either their competitors' taxes are increased or their own reduced").

In fact, this Court has found standing in a case in which it denied the benefits that the plaintiff sought. The plaintiff in *Heckler v. Mathews*, 465 U.S. 728 (1984), challenged regulations limiting the amount of benefits that he could obtain under the Social Security Act.[3] The defendant argued that Mathews had no

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[3] Until 1977, that statute allowed benefits only to men who could demonstrate dependency on their wage-earning wives. Wives and widows were entitled to spousal benefits without any such showing. This Court deemed those regulations to be in violation of the equal protection clause. *Califano v. Goldfarb*, 430 U.S. 199 (1977). Congress then repealed the dependency requirements, but included an offset provision that reduced the amount of spousal benefits by the amount of government pensions that an applicant received. *Heckler*, 465 U.S. at 732. To prevent hardship for people who had relied on benefits allowed prior to 1977, Congress exempted from the new offset provisions those people eligible under the old law. *Id.*, 465 U.S. at 733.

Mr. Mathews challenged the disparate application of the pension offset provisions as violating the due process clause of the fifth

standing because, even if the court declared the regulations invalid, he would receive no increase in benefits. *Id.*, 465 U.S. at 737. The Court disagreed, stating that:

> because the right asserted by appellee is the right to 'receive benefits . . . distributed according to classifications which do not without sufficient justification differentiate among covered [applicants] solely on the basis of sex,' and not a substantive right to any particular amount of benefits, appellee's standing does not depend on his ability to obtain increased Social Security payments.

Id., 465 U.S. at 737 (citations omitted). The Court then upheld the regulations and reversed the district court's award to Mr. Mathews. *Id.*, 465 U.S. at 750-51.

The situation is the same in the case now before this Court. AGC does not claim a substantive right to any particular City contract. Contractors are realistic about the vicissitudes of their profession, and recognize that many factors determine which companies receive municipal contracts. All that AGC members have asked in this lawsuit is that none of those factors include unconstitutional preferences. They simply request that they be able to bid for contracts on an equal basis with all racial groups.

Given those claims, the only injury that AGC must allege in order to have standing is unequal access to the bidding process.

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amendment. The district court agreed with his argument, and ordered that Mathews and the rest of the plaintiff class receive full benefits with no offset for government pensions. *Id.*, 465 U.S. at 737.

AGC has alleged that unequal treatment, and has established its standing to sue on behalf of its members.

C. The Eleventh Circuit's Rule is Based Upon a Misunderstanding of this Court's Precedent.

The Eleventh Circuit and like-minded courts have based their rule on a variety of precedent. Some courts cited no precedent for the rule, *e.g.*, *Maryland Highway Contractors v. State of Maryland*, 933 F.2d 1246 (4th Cir.), *cert. denied*, __ U.S. __, 112 S.Ct. 373 (1991), while other courts cited each other. *E.g.*, *Michigan Road Builders Ass'n, Inc. v. Blanchard*, 761 F. Supp. 1303, 1310-11 (W.D. Mich. 1991) (citing Eleventh and Fourth Circuit decisions); *Underground Contractors Ass'n v. Metropolitan Water Reclamation District of Greater Chicago*, No. 90-C-3586 (unpublished) (N.D. Ill. July 10, 1991) (citing Eleventh and Fourth Circuit decisions).

Most of the courts, however, have based their rule upon a strained reading of this Court's decisions in *Warth v. Seldin*, 422 U.S. 490 (1975), and *Allen v. Wright*, 468 U.S. 737 (1984). *See, e.g.*, *Cone Corp. v. Florida DOT*, 921 F.2d 1190, 1204-05 (11th Cir.), *cert. denied*, __ U.S. __, 111 S.Ct. 2238 (1991); *Carpenter v. Barnhardt*, No. 88-3578 (unpublished) (4th Cir. 1990).

This Court did hold that the plaintiffs in *Warth* and *Allen* lacked standing. Neither of those cases, however, controls the disposition of this case.

In *Allen*, 468 U.S. 737, the plaintiffs were parents of black children who challenged the IRS standards and procedures regarding racially discriminatory schools. The children had not

been excluded from any such schools, and had never applied for admission. *Id.*, 468 U.S. at 746. Instead, the parents claimed injuries that this Court held were not judicially cognizable and could not be causally traced to the IRS standards. *Id.*, 468 U.S. at 753.

In *Warth*, 422 U.S. 490, this Court considered equal protection challenges to the zoning ordinances of Penfield, a suburb of Rochester, New York. The four groups of plaintiffs alleged various injuries from policies that, they claimed, prevented persons of low and moderate income from living in the town. The Court found that none of the four groups had standing.

The first group of plaintiffs of Rochester residents directly affected by the ordinance. The Court accepted the asserted injury, inability to find affordable housing, as sufficient for standing. But, because the residents could prove no causal connection between the zoning ordinances and their injury, they had no standing. *Id.*, 422 U.S. at 503-508.

The second group of plaintiffs claimed taxpayer standing. The Court declined to allow the taxpayers to assert the rights of persons not involved in the case, and noted the lack of a causal connection between their Rochester taxes and the ordinances of a nearby suburb. *Id.*, 422 U.S. at 508-510.

The third category, a non-profit group concerned with low-cost housing, had no standing on behalf of its members as taxpayers. *Id.*, 422 U.S. at 512. Nor could it claim that any of its members had statutory standing or had been directly affected by the zoning ordinances. *Id.*, 422 U.S. at 513-14.

The final group of plaintiffs included building associations who claimed their members were excluded from Penfield. These builders did not claim any discrimination against themselves, but

only indirect injuries resulting from discrimination against others. *Id.*, 422 U.S. at 514. Even those alleged injuries, loss of economic profits, were too speculative to confer standing. Id., 422 U.S. at 514-517.

Both *Allen* and *Warth* present different concerns than the instant case. Unlike the plaintiffs in *Allen*, AGC is asserting an injury long recogtnized by this Court -- unequal treatment in government programs. Unlike the building associations in *Warth*, AGC is not challenging discrimination aimed at others. AGC's challenge is to ordinances that directly govern its members. Application of the ordinance to AGC members is not an "abstract injury in non-observance of the Constitution." *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 222 n. 13 (1974). The discrimination the ordinance mandates is not directed at AGC clients or acquaintances. AGC's members themselves are injured by unequal treatment in the City's bidding process.

The Eleventh Circuit and the other courts that require proof of a specific lost contract have ignored the real injury of discrimination against AGC members. In relying on *Allen* and *Warth*, these courts have distorted the principle of having the correct plaintiff before the court into a narrow, mechanical requirement of a specific economic injury. AGC non-minority members are appropriate plaintiffs to challenge the City's ordinance, they have suffered a real injury, and the Eleventh Circuit should have looked no farther than that injury.

D. The Eleventh Circuit's Rule Would Twist Principles of Constitutional Review Beyond Recognizable Parameters.

Limiting the cognizable injury in this case to a specific lost contract would subvert the principles of constitutional review in several ways. The first, and perhaps most detrimental, effect of that rule would be to convert all facial challenges of statutes into challenges of the statute as applied to a particular plaintiff.

A statute can violate the equal protection clause of the U.S. Constitution in two ways. It can on its face create classifications based on unconstitutional criteria and mandate different treatment based on those classifications, *see, e.g., J.A. Croson Co.*, 488 U.S. 469; *Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 273 (1986). Alternatively, a statute that is neutral on its face can be applied in a discriminatory manner. *Cf., Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 50 (1959) (English language requirement for voting was not unconstitutional on its face, but plaintiffs might be able to challenge it as applied).

When a plaintiff challenges a statute as facially invalid, he or she need not prove that it was applied in a discriminatory manner. Such plaintiffs need only show that the statute creates unconstitutional classifications and mandates unequal treatment for people in the plaintiffs' category. *See, e.g., Quinn v. Millsap*, 491 U.S. 95 (1989) (plaintiffs who did not own real property could challenge law allowing only property owners to serve on government board). In "as applied" challenges, on the other hand, the decision often turns on facts unique to a specific case, and the court may invalidate a particular application while leaving the ordinance intact. *See, e.g., City of Cleburne, Tex. v.*

Cleburne Living Center, 473 U.S. 373 (1985) (upholding ordinance requiring special use permits, but invalidating application that prohibited particular home for mentally retarded).

The Eleventh Circuit rule turns this distinction on its head. Under the "specific contract" rule, even in a facial challenge to a statute, a plaintiff must prove that the statute caused a deprivation *in a particular case*. For example, in *Cone Corp.*, 921 F.2d 1190, the Eleventh Circuit held that the plaintiffs lacked standing to challenge a state MBE policy. The court specifically noted that if the statute required implementation of unlawful set-asides and goals, "then the court could conclude that the plaintiffs might suffer a denial of equal protection -- *in a case where but for the set-aside or goal, they would have been the successful bidder.*" *Id.*, 921 F.2d at 1207 (emphasis added).

If judicial review of a government policy depends upon its application in a particular case, then there can be no challenges to those policies as written. Any "judicial challenge must await demonstration that this provision has actually been applied to the detriment of one of the plaintiffs." *Pennell*, 485 U.S. at 16 (Scalia, J., concurring). The distinction between the two types of challenges becomes meaningless, and potential plaintiffs must suffer under unconstitutional government policies until they can prove a specific type of harm.

Petitioner's complaint meets the standards for facial challenges of statutes. AGC alleged that the Jacksonville ordinance on its face created different categories of firms competing for city contracts. AGC members are in a category for which the law mandates unequal treatment, and the distinction is based on unconstitutional criteria. Such an allegation should be sufficient to establish standing to challenge the City's ordinance as written.

A second effect of the Eleventh Circuit rule is to turn the equal protection clause into a guarantor of equal benefits rather than equal treatment. Under the standard applied to this case, a plaintiff challenging eligibility rules for a government program must show that, absent discriminatory policies, he or she would have received government funds. Similarly, a criminal defendant would be required to show that, absent race-based peremptory challenges, he or she would have been acquitted.

Such a showing is relevant, however, only if the equal protection clause guarantees a substantive result. If, as explained above, the equal protection clause guarantees only equal opportunity, then the only relevant inquiry for standing is the restrictions on competition. By shifting the focus to require evidence of benefits from the competition, the Eleventh Circuit allows the equal protection clause to apply only to plaintiffs entitled to those benefits. Under that formulation, the equal protection clause no longer governs opportunity; it protects only results.

Such a standard is not compatible either with this Court's past rulings or the substance of the equal protection clause. The equal protection clause does not protect only economic entitlements; therefore, proof of such entitlements is not necessary for standing. The equal protection clause guarantees only equal treatment; whenever a plaintiff shows that he or she has been shut out of the process, that injury is sufficient for standing.

A final problem with the Eleventh Circuit rule is that it confuses the requirements for standing and those governing damages. The "specific contract" rule requires all plaintiffs seeking equitable relief to show evidence entitling them to damages, and it effectively could prevent any challenges by associations to similar ordinances.

The Eleventh Circuit has noted that the evidence it mandates, a lost contract, would be sufficient for standing to seek monetary relief:

> We note that if one of the prime contractors or the subcontractor plaintiff had shown that it had lost, or was in imminent danger of losing, a specific contract or subcontract because of race in violation of the fourteenth amendment, it would have standing to seek individualized relief, such as damages (if it sued a defendant that was not immune from liability) or an order directing the Secretary to eliminate the set-aside or goal for that contract or to award the contract to the plaintiff.

Cone Corp., 921 F.2d at 1205 n. 49. That evidence, however, does not define the requirements for standing to seek equitable relief. The two issues, standing and relief, are separate, *Bakke*, 438 U.S. at 281, n.14, and should remain so.

AGC did not seek damages for any lost contracts. It sought an injunction, Complaint ¶ 55, R-1-1, Joint Appendix at App-20, to prevent the City from following its ordinance. To have standing to seek that relief, AGC should be required only to show that the ordinance applied on its face to AGC members. Any other question, such as whether AGC members lost profits, "is merely one of relief," *id.*, and should be confined to that issue.

Indeed, if AGC had sought damages for contracts its members lost, it likely would not have had standing to bring this lawsuit. One of the requirements for associational standing is that neither the claim nor the relief requested require participation of individual members in the lawsuit. *Hunt*, 432 U.S. at 343. If a specific AGC member had lost a specific contract, that damage

claim would be one "not common to the entire membership, nor shared by all in equal degree." *Warth*, 422 U.S. at 515. Therefore, each AGC member who lost a contract would be a necessary party to the suit, and AGC would not have standing to seek damages for those lost contracts. *Id.*, 422 U.S. at 515-16. The evidence that the Eleventh Circuit requires, specific lost contracts, would according to this Court preclude associational standing. By its very terms, then, the Eleventh Circuit's rule would not allow associations to challenge preferences in the award of government contracts.

In sum, the Eleventh Circuit's rule is inconsistent with long-recognized principles of judicial review. AGC challenges the City's ordinance on its face; the "specific contract" rule requires evidence of how the ordinance is applied. AGC alleges unequal treatment in the bidding process; the Eleventh Circuit requires evidence of successful results from that process. AGC seeks an injunction; the "specific contract" rule requires evidence of damages. AGC claims injury to its members; the Eleventh Circuit requires evidence of specific lost contracts. If AGC does have evidence of lost contracts, this Court has held it has no standing. The bright-line rule adopted by the Eleventh Circuit and other courts cannot stand without warping the principles of constitutional jurisprudence.

E. AGC's Allegations Establish Sufficient Facts to Sustain Standing in this Case.

AGC's verified complaint establishes that the City of Jacksonville, through its old ordinance, shut AGC members out of the bidding process for at least 10% of the contracts the City

awarded. The new ordinance shuts AGC members out of an unspecified percentage of City contracts, and places extra burdens on AGC members by way of bidding preferences for another unspecified percentage of City contracts. These allegations are sufficient to establish, at least at the pleading stage, that the City treats AGC's members differently from other bidders in awarding some contracts. *Cf.*, *Pennell*, 485 U.S. at 8 (plaintiff association had standing where complaint alleged that ordinance would be enforced against members, thereby reducing rent payments).

Unequal treatment is sufficient injury for standing in equal protection cases. The unequal treatment in this case is "concrete and particularized," *Warth*, 422 U.S. at 508, and the application of the ordinance to AGC members is both "actual" and "imminent." *Lujan*, 112 S.Ct. at 2136.

The allegations also establish the other two components of standing, a causal connection and redressability. After all, it is the statutes themselves that mandate the unequal treatment in bidding for City contracts that AGC members have suffered. Similarly, the injury is redressable because if the ordinances can no longer be enforced, the mandated discrimination will cease.

Thus, if federal courts identify the requisite injury in this case in accordance with the precedent of this Court, AGC has established its standing. The Jacksonville ordinances deny

> certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race. To whatever racial group these citizens belong, their "personal rights" to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking."

J.A. Croson Co., 488 U.S. at 493 (plurality).

II. Even if AGC Must Indentify a Specific Contract to Establish Standing, the Eleventh Circuit Erred in Dismissing Rather than Remanding This Case.

Even if the Eleventh Circuit was correct in shifting the focus of the equal protection clause to a specific economic injury, it ignored the prevailing law requiring remand rather than dismissal. In *Warth*, 422 U.S. 490, this Court noted that the trial court has the power to allow a plaintiff to supply evidence supporting standing. "If, after this opportunity, the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed." *Id.* at 501-502. This Court has recognized in numerous other cases the importance of allowing a plaintiff to meet a new standing requirement rather than dismissing the case.

Ten years ago, this Court allowed plaintiffs to challenge discriminatory housing practices even though it had reservations about the plaintiffs' ability to produce sufficient evidence of injury:

> Under the liberal federal pleading standards, we therefore agree with the Court of Appeals that dismissal on the pleadings is inappropriate at this stage of the litigation. At the same time, we note that the extreme generality of the complaint makes it impossible to say that respondents have made factual averments sufficient if true to demonstrate injury in fact. Accordingly, on remand, the District Court should afford the plaintiffs an opportunity to make more definite the allegations of the complaint. Cf. Fed.Rule Civ.Proc. 12(e).

> If after that opportunity the pleadings fail to make averments that meet the standing requirements established by the decisions of this Court, the claims should be dismissed.

Havens Realty Corp. v. Coleman, 455 U.S. 363, 377-78 (1982). *Cf.*, *Gladstone Realtors*, 441 U.S. at 115 ("the facts alleged in the complaints and revealed by initial discovery are sufficient to provide standing under Art. III. It remains open to petitioners, of course, to contest these facts at trial").

This Court recently expanded on that reasoning in *Lujan v. Defenders of Wildlife*, ____ U.S. ____, 112 S.Ct. 2130 (1992). In holding that the plaintiffs had failed to prove sufficient injury-in-fact from environmental harms occurring outside the United States, the Court made a significant distinction between the allegations required for pleadings and that required for summary judgment. The Court specifically stated that at the pleading stage, general factual allegations may suffice. *Id.*, 112 S.Ct. at 2137. In response to a motion for summary judgment, however, the plaintiff must present affidavits or other evidence setting forth "specific facts." *Id.*

This Court further illustrated the importance of the stage of the litigation in *Lucas v. South Carolina Coastal Council*, ____ U.S. _____, 112 S.Ct. 2886 (1992). In that case, the plaintiff claimed that a state statute diminished the value of his property in violation of the takings clause of the U.S. Constitution. The Court held that he had alleged sufficient injury to sustain standing. Because of the way that the South Carolina court had foreclosed further pleading in regard to Mr. Lucas's claim under the 1989 state statute, this Court addressed that particular claim "as if the case were here on the pleadings alone." *Lucas*, 112 S.Ct. at 2891-2892, n.3. The Court stated that *Lujan*, by

contrast, involved a motion for summary judgment and required "specific facts to be adduced by sworn testimony." *Id.* If the respondent in *Lujan* had challenged the generalized allegations of injury-in-fact at the pleading stage, the challenge "would have been unsuccessful." *Id. See also, Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990) (distinguishing *U.S. v. SCRAP*, 412 U.S. 669 (1973), as involving a Rule 12(b) motion to dismiss on the pleadings).

Even the other courts that followed the Eleventh Circuit's lead in requiring a specific lost contract to establish standing dismissed the cases only after a trial or discovery and in some cases a hearing on the issue. Only the Eleventh Circuit has adopted the draconian rule of establishing a never-before articulated rule for standing, and then dismissing a case for failure to meet that standard.

In the instant case, the first mention of standing as an issue was in the concurring opinion in the first appeal to the Eleventh Circuit, rendered after the record was closed and the parties had filed motions for summary judgment. The law of the Circuit did not change until after the district court had ruled on those motions for summary judgment. Despite the fact that AGC had had no opportunity to present evidence on standing, the Eleventh Circuit ordered the case dismissed.

AGC's standing should be considered on the basis of its pleadings rather than any failure to meet a nebulous, *ex post facto* standard. AGC presented no evidence of actual contracts lost because of the Jacksonville ordinance, but it did demonstrate that such applications would, at least 10% of the time, be futile. Like David Lucas, it presented sufficiently specific injuries in its pleadings to withstand the scrutiny appropriate for that stage of the trial. It is only if the court applies the more strict, inappropriate summary judgment standard that AGC's evidence falls short. As this Court recognized in its most recent decisions, pleadings are different from summary judgment. If AGC is to be required to show economic injury, it should be granted the opportunity to meet that requirement.

CONCLUSION

For all of the foregoing reasons, AGC respectfully requests that this Court reverse the ruling of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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No. 91-1721

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

NORTHEASTERN FLORIDA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA,

Petitioner,

v.

CITY OF JACKSONVILLE, FLORIDA and ED AUSTIN, in his official capacity as Mayor of the City of Jacksonville,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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No. 91-1721

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

NORTHEASTERN FLORIDA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA,

Petitioner,

v.

CITY OF JACKSONVILLE, FLORIDA and ED AUSTIN, in his official capacity as Mayor of the City of Jacksonville,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENTS

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January 15, 1993

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QUESTION PRESENTED FOR REVIEW

(1) Whether an association challenging an affirmative action ordinance must plead and prove actual or imminent injury with particularity to satisfy constitutional standing?

LIST OF INTERESTED PARTIES

The Petitioner, Northeastern Florida Chapter of the Associated General Contractors of America (hereinafter referred to as "AGC"), and the Respondents, City of Jacksonville, Florida and Tommy Hazouri, in his official capacity as Mayor of the City of Jacksonville (hereinafter referred to as "City"), were parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit. Tommy Hazouri is no longer Mayor of the City of Jacksonville. Pursuant of Rule 35.3 of the Rules of this Court, the City has substituted the current Mayor, Ed Austin, in the caption of this case.

None of the parties has any parent companies or subsidiaries. AGC is affiliated with the Associated General Contractors of America, a non-profit corporation.

TABLE OF CONTENTS

Question Presented for Review i

Listed of Interested Parties ii

Table of Contents iii

Table of Authorities iv

Statement of the Case 1

Summary of Argument 4

Argument

I.
AGC LACKS STANDING BECAUSE IT FAILED TO ALLEGE WITH PARTICULARITY THAT ITS MEMBERS SUFFERED ACTUAL OR THREATENED INJURY.
. 7

II.

AGC's GRIEVANCE AGAINST CITY'S ORDINANCE WITHOUT A SHOWING OF PARTICULARIZED HARM IS AN ABSTRACT INJURY INSUFFICIENT TO CONFER STANDING.
. 17

III.
AGC FAILED TO SUPPORT ITS MOTION FOR SUMMARY JUDGMENT WITH EVIDENCE OF PARTICULARIZED INJURY. 26

IV.
CITY'S REPEAL OF THE CHALLENGED ORDINANCE MOOTS THIS APPEAL. 29

CONCLUSION 30

TABLE OF AUTHORITIES

PAGE

Allen v. Wright,
468 U.S. 737 (1984) . . . 7, 8, 17, 18, 19, 20, 21, 22

Celotex Corp v. Catrett,
477 U.S. 317 (1986) 26

Frothingham v. Mellon, 262 U.S. 447 (1923) . . . 8, 18

FW/PBS, Inc. v. Dallas,
439 U.S. 215 (1990) 26

Heckler v. Mathews,
465 U.S. 728 (1984) 22

Juidice v. Vail, 430 U.S. 327 (1977) 27

Los Angeles v. Lyons, 461 U.S. 95,
102 (1983) 9, 14

Lujan v. Defenders of Wildlife,
504 U.S. --, 119 L.Ed.2d 351 (1992) . 7, 8, 9, 14, 26

Northeastern Florida Chapter v. Jacksonville, Florida,
896 F.2d 1283 (11th Cir. 1990) 2

O'Shea v. Littleton,
414 U.S. 488 (1974) 9, 11

Regents of California v. Bakke,
438 U.S. 265 (1978) 22

Schlesinger v. Reservists Committee
to Stop the War, 418 U.S. 208 (1974) 17, 18

Simon v. Eastern Ky. Welfare
Rights Org., 426 U.S. 26 (1976) 12, 15, 16

United States v. Richardson
418 U.S. 166 (1974) 17, 18

United States v. SCRAP,
412 U.S. 669 (1983) 19

Valley Forge College v. Americans United,
454 U.S. 464 (1982) 7, 8, 13, 17, 18, 19, 20

Warth v. Seldin, 422 U.S. 490 (1975)
. . . . . 8, 9, 10, 11, 12, 16, 18

Whitemore v. Arkansas, 495 U.S. 149 (1990) 24

OTHER AUTHORITIES

United States Constitution
Article III 4, 5, 7, 9, 16, 18, 24, 25, 27

Fed.R.Civ.P. 56(e) 26

Jacksonville Ordinance Code
Repealed Section 126.604(a) 1
Repealed Section 126.604(b)(3) 1
Repealed Section 126.605(a)(4) 1
Repealed Section 126.605(b)(3) 1
Repealed Section 126.608 . . . . . 1, 2
Repealed Section 126.613 2

STATEMENT OF THE CASE

The AGC in its statement of the case omits highly relevant information regarding the precise nature of the challenged affirmative action ordinance.

The City's ordinance is directed at increasing the participation of minority business enterprises in government procurement. It establishes an affirmative action program allocating up to ten percent of certain contracting opportunities for minorities. The ordinance does not dictate a mandatory quota requiring a certain number of contracts to be let. Sections 126.604(a), 126.604(b)(3), 126.605(a)(4) and 126.605(b)(3) declare that mathematical certainty is not required in reaching the goals. Petition Appendix at A.15-21. Moreover, Section 126.608 contains a discretionary provision whereby the chief purchasing officer upon evidence of, among other things, the unavailability of minority businesses and the City's cost in meeting the goals, may waive the program's application. Petition Appendix at

A.24. Section 126.608 also states that when a project is waived, the City may reduce the goal by that amount. *Id.*

Amended Section 126.613 contains a specific durational period of five years from October 1, 1988. Petition Appendix at A.26-27. Upon its expiration, the City Council may reenact the ordinance if the disparity in minority business participation has not been remedied. Id.

On the prior appeal of this case, the Eleventh Circuit, in *Northeastern Florida Chapter v. Jacksonville, Florida,* 896 F.2d 1283 (11th Cir. 1990), concluded that a preliminary injunction was not warranted in that the record below was inadequate to sustain equitable relief. Joint Appendix at J.A.34-43. The Eleventh Circuit held that the AGC had failed to make the requisite showing of irreparable injury in that the association failed to bring forth representatives who could assert injury resulting from the City's enforcement of the affirmative action program.

No affidavit in support of the AGC's standing

was submitted into the record.

SUMMARY OF ARGUMENT

The Eleventh Circuit correctly dismissed the AGC's case for lack of standing. The decision on standing is consistent with Article III case and controversy requirements and Supreme Court precedent.

The Eleventh Circuit concluded that the AGC failed to demonstrate actual or imminent injury by virtue of the existence of the City's affirmative action ordinance. There was no individualized showing of specific injury. In particular, the AGC did not establish that one of its members had a personal stake in the controversy. It cannot therefore be determined whether a decision on the ordinance's constitutionality would likely redress the grievances of any AGC member.

The pleadings below stand as nothing more than a generalized complaint against the ordinance. The Eleventh Circuit properly refrained from adjudicating the case on the merits in the absence of a particularized injury.

To have done otherwise, would have been to render a decision on a purely hypothetical question in violation of Article III and the separation of powers doctrine.

The AGC defined its injury as economic, that is, "lost business opportunities and profits." This shaped the Eleventh Circuit's inquiry into whether any AGC member lost a contract because of the program. The AGC failed to identify such a member. The complaint remains deficient in the absence of particularized allegations, regardless of the AGC's attempt to broaden its stated injury under the "umbrella" of equal protection.

It should be highlighted that the AGC concedes that its evidence is insufficient to support standing at the summary judgment stage. The AGC did not come forward with a single affidavit on this essential element in its own summary judgment motion. The court was obligated to review the record *sua sponte* to determine if Article III case and controversy had been met.

Accordingly, the Eleventh Circuit's decision to dismiss the case without prejudice is proper in the face of the inadequate pleadings and the lack of standing evidence. Lastly, the subsequent repeal of the challenged ordinance rendered the appeal of this case moot.

I.
AGC LACKS STANDING BECAUSE IT FAILED TO ALLEGE WITH PARTICULARITY THAT ITS MEMBERS SUFFERED ACTUAL OR THREATENED INJURY.

Article III, Section 2 of the United States Constitution restricts the exercise of judicial power to deciding actual cases and controversies. The cornerstone of Article III standing is the constitutional doctrine of separation of powers. *Allen v. Wright*, 468 U.S. 737, 752 (1984). The federal courts are constrained within the constitutional framework to decide disputes upon a demonstration of injury. *Valley Forge College v. Americans United*, 454 U.S. 464, 471-474 (1982); *Lujan v. Defenders of Wildlife*, 504 U.S. --, 119 L.Ed.2d 351, 377 (1992) (Kennedy, J., with Souter, J., concurring in part and concurring in judgment). Any abandonment of this constitutional function of deciding actual cases would be a

usurpation of power over the other branches of government. *Frothingham v. Mellon*, 262 U.S. 447, 488-489 (1923).

Despite the absence of a precise definition of standing, case law has established its parameters. *Valley Forge College v. Americans United, supra,* 454 U.S. at 475-476; *Allen v. Wright, supra*, 468 U.S. at 751. The Supreme Court has declared that standing contains three basic elements. *Lujan v. Defenders of Wildlife, supra*, 119 L.Ed.2d at 364. A plaintiff must allege facts showing actual or future injury, fairly traceable to the challenged action and redressable by a favorable decision. *Allen v. Wright, supra*, 468 U.S. at 751. These are a condition precedent to maintaining any action. *Warth v. Seldin*, 422 U.S. 490, 518 (1975).

Where a plaintiff seeks declaratory and injunctive relief, standing is satisfied if it is shown that the defendant is likely to injure the plaintiff. Injury is established by demonstrating specific instances of past harm, and that the

challenged law mandates imminent unconstitutional conduct. *O'Shea v. Littleton*, 414 U.S. 488, 495-496 (1974); *Los Angeles v. Lyons*, 461 U.S. 95, 102, 105-106 (1983). Article III demands that a plaintiff clearly and specifically set forth facts of injury sufficient to justify judicial review. *Warth v. Seldin, supra*, 422 U.S. at 501, 517-518.

Injury-in-fact is an invasion of a legally protected interest. *Lujan v. Defenders of Wildlife, supra*, 119 L.Ed.2d at 364. The legally protected interest must be concrete and particularized. *Warth v. Seldin, supra*, 422 U.S. at 508. The injury cannot be abstract, conjectural or hypothetical. *O'Shea v. Littleton, supra*, 414 U.S. at 494; *Los Angeles v. Lyons, supra,* 461 U.S. at 101-102. It should be actual or imminent. *Id.* at 102. Moreover, the injury must affect a plaintiff in a personal way. *Warth v. Seldin, supra*, 422 U.S. at 498; *Lujan v. Defenders of Wildlife, supra*, 119 L.Ed.2d at 364, n.1. A federal court's jurisdiction can be invoked only to protect against injury to

the plaintiff itself even though the ultimate judgment may benefit others collaterally. *Warth v. Seldin*, *supra*, 422 U.S. at 499. Without such allegations of injury, judicial review would be an encroachment on separation of powers.

In *Warth v. Seldin*, *supra*, the challenged conduct was a zoning ordinance that restricted the vast majority of vacant land to single-family housing. *Id.* at 495. Individual minority plaintiffs sued claiming the ordinance intentionally excluded them from residing within the town. *Id.* 495-496. An home builder association intervened claiming that the ordinance precluded them from building low cost housing thereby depriving them of profits. *Id.* at 497.

The Supreme Court affirmed the dismissal of the action on the ground of standing. The *Warth* Court held that the minority plaintiffs lacked standing because even though they shared attributes common to persons who may have been excluded, i.e. race or economic status, this was an insufficient predicate for the conclusion that they

themselves have been excluded. The *Warth* Court further stated that they must allege and show that they personally have been injured. Injury suffered by other unidentified members of the class to which they belong or purport to represent was not enough. "Unless these petitioners can thus demonstrate the requisite case or controversy between themselves personally and respondents, 'none may seek relief on behalf of himself or any other member of the class.'" *Id.* at 502 *citing O'Shea v. Littleton*, *supra*, 414 U.S. at 494.

The *Warth* Court denied standing to the home builder association as well. The Court found that there was no particularized injury. Specifically, the complaint did not refer to a specific project of any member that was precluded either by the ordinance or by respondent's action in enforcing it. There was no allegation that any member had applied to respondents for a building permit or variance with respect to any then current project. There was no indication

that respondents had interfered with any project proposed by the members. In short, the association failed to show the existence of any injury to its members warranting judicial intervention. *Id.* at 516.

The demand for personalized injury is not eliminated because a plaintiff is an association nor is it enhanced. To establish representative standing, an association must allege that its members, or any one of them, are suffering immediate or threatened injury that would confer standing had the members themselves brought suit. *Warth v. Seldin, supra*, 422 U.S. at 511, 515; *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 39-40 (1976). The AGC's assertion that the Eleventh Circuit decision prevents representative standing distorts the ruling. Brief of Petitioner at pages 25-26 (hereinafter referred to as "Brief at ____). The Eleventh Circuit properly required the AGC to show that any one of its members are suffering immediate or threatened injury as a result of the challenged

ordinance. *Valley Forge College v. Americans United, supra*, 454 U.S. at 476 n.14. The AGC failed to do so.

The AGC's complaint failed to establish a personal stake in the case. From the four corners of the complaint, it cannot be ascertained whether AGC members are directly affected by the ordinance. The AGC's characterization of itself as a representative of non-minorities is insufficient to confer standing. Like the *Warth* individual plaintiffs, racial status is not enough. Moreover, like the *Warth* association plaintiff, the AGC does not identify a particular member who was not permitted to bid on a particular project. Nor does it demonstrate that any member was eligible to bid on any project designated under the ordinance. In short, the AGC's complaint suffers from the same infirmities as the *Warth* plaintiffs discussed above in relation to particularized injury. The Eleventh Circuit correctly concluded that the AGC did not allege an injury-in-fact as a result of the City's enactment of its affirmative

action ordinance.

The simple existence of the ordinance does not automatically mean that there will be imminent injury. Imminence means that a plaintiff will soon be exposed to the injury. *Los Angeles v. Lyons*, *supra*, 461 U.S. at 105-106; *Lujan v. Defenders of Wildlife*, *supra*, 119 L.Ed.2d at 367 n.2. Future injury is not shown when a plaintiff alleges only an injury at some indefinite time and the acts necessary for the injury to occur are at least partly within its own control. *Id.*

In *Lujan v. Defenders of Wildlife*, *supra*, the Court determined that stated vague intentions without any description of concrete plans or any specification when "some day" will be, do not support a finding of actual or future injury. *Id.* In the instant case, there is no allegation that any AGC member intends to bid on any future contracts let under the ordinance. Like *Lujan*, this contingency is within an AGC member's control. This is fatal to the claim

of standing.

Moreover, the AGC failed to establish that the ordinance mandated future unconstitutional conduct to its members. The AGC asserts that standing is established because bidding would be futile ten percent of the time. Brief at 30. There is no allegation in the complaint as to the percentage of construction contracts that have been let under the ordinance. The program is discretionary in that it contains waiver provisions. When a project is waived, the City may reduce the set aside goal by the contract amount. It is thus indefinite, uncertain and speculative that the City will set aside any construction contracts that any AGC member would be minimally eligible for. The Eleventh Circuit therefore found that the AGC failed to allege past concrete injury and that the likelihood of imminent injury was too speculative.

Standing further requires that the alleged injury will likely be redressed by a favorable outcome. *Simon v.*

Eastern Ky. Welfare Rights Org., *supra*, 426 U.S. at 38. There should be a high probability of tangible benefit to justify a court's intervention. *Warth v. Seldin*, *supra*, 422 U.S. at 508; *Simon v. Eastern Ky. Welfare Rights Org.*, *supra*, 426 U.S. at 43-45. Without a detailed showing of particular injury, this element must be denied. In this case, the AGC's failure to identify a particular injury negates the Court's ability to determine whether an AGC member would benefit in a tangible way from a decision on the merits in its favor.

The requirement of Article III case and controversy is not a mere formality. It is a threshold determinant of every case before a federal court. *Warth v. Seldin*, *supra*, 422 U.S. at 518. The AGC below treated the necessity of sufficient allegations of standing as an inconsequential consideration. The Eleventh Circuit therefore correctly dismissed the lawsuit without prejudice.

II.
AGC's GRIEVANCE AGAINST CITY'S ORDINANCE WITHOUT A SHOWING OF PARTICULARIZED HARM IS AN ABSTRACT INJURY INSUFFICIENT TO CONFER STANDING.

The complaint in this case alleges essentially that the mere existence of the ordinance violates the law. The ordinance creates classifications which are based on race. The AGC claims this is an unconstitutional criteria. Its entire argument is premised on the belief that "[s]uch an allegation should be sufficient to establish standing to challenge the City's ordinance as written." Brief at 23. This is a superficial treatment of standing doctrine.

A party has no standing to complain that government is generally violating the law. *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974); *United States v. Richardson*, 418 U.S. 166 (1974); *Valley Forge College v. Americans United, supra*, 454 U S. at 482-486; *Allen v. Wright*, *supra*, 468 U.S. at 754-756.

Consistent with separation of powers, a court may only review the legality of official action as incident to an actual case properly before it. *Frothingham v. Mellon*, *supra*, 262 U.S. at 488-489. Even a congressional enactment cannot lower the threshold requirements of standing under Article III. *Valley Forge College v. Americans United, supra,* 454 U.S. at 487 n.24;

Injury-in-fact means more than an injury to a cognizable interest. *Allen v. Wright, supra*, 468 U.S. at 755-756. It requires the party seeking review to be among the injured. This element of standing is satisfied with a party's demonstration of personal stake in the outcome. *Warth v. Seldin*, *supra*, 422 U.S. at 508. The plaintiff must allege an injury distinct and palpable to oneself, even if it is shared by others. *Id.* at 501.

The Supreme Court has faithfully adhered to this principle. *Schlesinger v. Reservists Committee to Stop the War, supra*; *United States v. Richardson*, *supra*; *Valley*

Forge College v. Americans United, supra; *Allen v. Wright*, *supra*. These cases denied standing because, among other things, each plaintiff failed to identify any personal harm as a consequence of the alleged constitutional violation. After analysis of the respective complaints, it was obvious that although each claimed a constitutional violation, they claimed nothing personal to themselves.

If abstract injury were cognizable, then members of any racial group would have standing to challenge purported discrimination regardless of personal impact. *Allen v. Wright*, *supra*, 468 U.S. at 755-756. "Recognition of standing in such circumstances would transform the federal courts into 'no more than a vehicle for the vindication of the value interests of concerned bystanders.'" *Id. quoting United States v. SCRAP*, 412 U.S. 669, 687 (1983). A naked claim to standing, such as the AGC's complaint herein, has been previously discussed by this Court:

> Were we to recognize standing premised on an "injury" consisting solely of an alleged violation of a "'personal constitutional right' to a government that does not establish religion," *id.*, at 265, a principled consistency would dictate recognition of respondents' standing to challenge execution of every capital sentence on the basis of a personal right to a government that does not impose cruel and unusual punishment, **or standing to challenge every affirmative-action program on the basis of a personal right to a government that does not deny equal protection of the laws,** to choose but two among as many possible examples as there are commands in the Constitution. (Emphasis added.)

Valley Forge College v. Americans United, supra, 454 U.S. at 489 n.26.

In *Allen v. Wright*, *supra*, the Supreme Court recognized the injury of racial stigma as one of the most serious consequences of discriminatory government action. Despite this, the Court denied standing because none of the plaintiffs had personally suffered a denial of equal

protection. The Court stated that an allegation of stigmatizing injury caused by racial discrimination supports a standing claim only to those who are personally denied equal protection:

> If the abstract stigmatic injury were cognizable, standing would extend nationwide to all members of the particular racial groups against which the Government was alleged to be discriminating by its grant of a tax exemption to a racially discriminatory school, regardless of the location of that school. All such persons could claim the same sort of abstract stigmatic injury respondents assert in their first claim of injury. A black person in Hawaii could challenge the grant of a tax exemption to a racially discriminatory school in Maine.

Allen v. Wright, *supra*, 468 U.S. at 755-756.

The AGC cites numerous cases for the proposition that the Equal Protection Clause protects against government discrimination. This is correct. The Eleventh Circuit ruling does not, however, alter substantive equal protection law or standing doctrine. An allegation of

unequal treatment is insufficient to confer standing without particularized injury. For example, in *Heckler v. Mathews*, 465 U.S. 728, 739-740 (1984), the Court found standing because the plaintiff not only alleged unequal treatment, but also that he was personally injured. *See Allen v. Wright*, *supra*, 468 U.S. at 757 n. 22. In *Regents of California v. Bakke*, 438 U.S. 265 (1978), the Court found standing where the plaintiff had actually applied for admission to medical school and was allegedly denied admission on the basis of race.

Based on the above precedent, the Eleventh Circuit properly refused to hear this case on the merits. To have done otherwise, would have been to render an advisory opinion on the constitutionality of the ordinance.

The AGC accuses the Eleventh Circuit of distorting the principle of standing into a mechanical requirement of specific economic injury. Brief at 21. The AGC overlooks the fact that it defined its alleged injury in

economic terms. Specifically, the complaint is framed as a denial of business opportunities and lost profits. The complaint states, in pertinent part, that AGC members:

> [H]ave been damaged economically by being required to discriminate in the award of subcontracts . . . (Complaint ¶48), . . . have been deprived of substantial economic and business opportunities by being precluded from bidding on and performing subcontracts . . . (Complaint ¶49), [and] . . . have suffered, and will continue to suffer, irreparable harm and do not have an adequate remedy at law to terminate such discrimination and to recover the lost business opportunities and profits. . . ." (Complaint ¶52).

Despite the explicit allegations of the complaint, the AGC now claims that the lawsuit was not brought because of the loss of any contract. Brief at 12, 18. Rather, the AGC argues that the injury incurred was unequal treatment imposed generally by the ordinance's existence. The Eleventh Circuit decision requiring a showing of a specific lost contract was compelled by the AGC's

definition of its injury. Although the AGC claimed lost profits, it failed to allege that a particular contract was lost because of the ordinance. The court thus required the AGC to allege specific facts supporting the lost profits claim with more than mere conclusory statements of abstract injury. Accordingly, the Eleventh Circuit correctly found the complaint's purported economic injury to be insufficient in the context of Article III.

The Eleventh Circuit did not, and could not, embellish deficient allegations of economic injury to create standing. *See Whitemore v. Arkansas*, 495 U.S. 149, 155-156 (1990). If the AGC did not intend to argue lost profits as its injury, then it should not have done so in its complaint. It must now accept the responsibility for the consequences of its framing of the injury. In any event, regardless of the type of injury alleged, the AGC has failed to show any particularized injury whatsoever.

The AGC further argues that the Eleventh

Circuit's specific lost contract inquiry turns the distinction between 'facial' and 'as-applied' challenges "on its head."[1] It postulates that "[i]f judicial review of a government policy depends upon its application in a particular case, then there can be no challenges to those policies as written." Brief at 23. This reasoning is fundamentally flawed. Whether a challenge is 'facial' or 'as-applied', a plaintiff must set forth particularized injury as required by standing doctrine. To do otherwise, would permit a court to decide purely hypothetical questions in violation of Article III.

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[1]A facial challenge requires a demonstration that the government policy as written is not capable of any constitutional enforcement. A successful facial challenge requires the striking down of the ordinance. In contrast, an as-applied challenge requires a showing that the policy is being enforced in an unconstitutional manner. A successful as-applied challenge forbids the invalid application but does not invalidate the ordinance.

III.
AGC FAILED TO SUPPORT ITS MOTION FOR SUMMARY JUDGMENT WITH EVIDENCE OF PARTICULARIZED INJURY.

The party invoking federal jurisdiction bears the burden of establishing the elements of standing. *FW/PBS, Inc. v. Dallas*, 439 U.S. 215, 231 (1990). These elements must be supported in the same manner as any other upon which a party bears the burden of proof. Summary judgment must be entered against a party who fails to establish elements essential to its case. *Celotex Corp v. Catrett*, 477 U.S. 317, 322 (1986). A party cannot rest on its pleadings but must set forth specific facts of standing by affidavit and other evidence. Fed.R.Civ.P. 56(e); *Lujan v. Defenders of Wildlife*, *supra*, 119 L.Ed.2d at 364-365.

The AGC admits that it lacked evidence establishing its standing at the summary judgment stage. Brief at 30-31. To survive the motion for summary

judgment, the AGC had to submit affidavits or other evidence showing specific facts that one or more of its members would be personally harmed. It failed to do so. A court could thus reasonably find that no concrete injury existed to satisfy the AGC's standing.

There is no reason for this Court not to apply the summary judgment standard of review in the instant case. Both parties below moved for summary judgment. The AGC argues that it did not have notice that standing was an issue.[2] However, standing is so critical to constitutional separation of powers doctrine that a court must *sua sponte* review the question, regardless of whether the parties even raise it. *See e.g. Juidice v. Vail*, 430 U.S. 327, 331 (1977).

The AGC states further that the Eleventh Circuit held it to a new requirement of Article III case and controversy. This is not accurate. As demonstrated

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[2]It should be noted that a court has the authority to enter summary judgment *sua sponte*. *See Celotex Corp. v. Catrett, supra,* 477 U.S. at 326.

previously, the Eleventh Circuit applied traditional standing doctrine. In any event, this does not excuse the AGC's failure to submit a single affidavit establishing standing in support of its motion for summary judgment.

Accordingly, the Eleventh Circuit properly dismissed the case without prejudice, because the AGC did not meet the burden of demonstrating standing to sustain this lawsuit.

IV.
CITY'S REPEAL OF THE CHALLENGED ORDINANCE MOOTS THIS APPEAL.

The City adopts and incorporates herein by reference the arguments presented in its motion to dismiss as moot, which the Court denied on December 14, 1992. The City substantially redrafted its ordinance, conducted numerous public hearings and created a contemporaneous record when it enacted the current ordinance. The basis for the grant of summary judgment below has been eliminated by legislative action.[3]

The Eleventh Circuit dismissed the AGC's case without prejudice. The Court of Appeals should be affirmed.

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[3]The AGC also concedes that the grant of summary judgment below was unwarranted in that it failed to establish standing at this stage of the proceedings. Brief at 30-31.

CONCLUSION

The AGC failed to plead and prove injury with particularity to any of its members. For all the reasons stated above, the City respectfully requests that the United States Supreme Court affirm the judgment of the Court of Appeals, or alternatively, dismiss the appeal as moot.

Respectfully submitted,

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NORTHEASTERN FLORIDA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA,

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CITY OF JACKSONVILLE, FLORIDA and ED AUSTIN, in his official capacity as Mayor of the City of Jacksonville,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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QUESTION PRESENTED FOR REVIEW

Whether an association challenging a racially exclusive government ordinance may establish standing by showing that its members are treated unequally in the bidding process for certain municipal contracts, or whether an association must show that its members actually would have received one or more of those contracts absent the ordinance?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
ARGUMENT	1
I. Unequal Treatment in Consideration for Government Contracts Is Sufficient Injury to Establish Standing	1
II. Petitioner's Complaint Contains Sufficient Allegations of Immediate, Particularized Injury to Establish Standing	3
A. AGC's Complaint Satisfies the Standard for Construing Pleadings	3
B. AGC's Complaint Establishes Actual Exclusion of AGC Members from the City's Bidding Process	5
C. AGC's Complaint Establishes Imminent Exclusion of AGC Members from the City's Bidding Process	10
CONCLUSION	13

TABLE OF AUTHORITIES

	Page
Allen v. Wright, 468 U.S. 737 (1984)	5
Babbitt v. United Farm Workers Nat. Union, 442 U.S. 289 (1979)	11
Bishop & Co. v. Midland Bank, 84 F.2d 585 (9th Cir.), *cert. denied*, 299 U.S. 587 (1936)	2
Com. of Pennsylvania v. State of West Virginia, 262 U.S. 553 (1923)	11
Cone Corp. v. Florida Dept. of Transp., 921 F.2d 1190 (11th Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2238 (1991)	2
E.I. Dupont De Nemours & Co. v. Davis, 264 U.S. 456 (1924)	2
Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1979)	4, 12
Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982)	11
Heckler v. Mathews, 465 U.S. 728 (1984)	2
International Broth. of Teamsters v. U.S., 431 U.S. 324 (1977)	9
Lujan v. Defenders of Wildlife, ___ U.S. ___, 112 S.Ct. 2130 (1992)	5
Pennell v. City of San Jose, 485 U.S. 1 (1988)	6, 7, 9, 11
S.J. Groves & Sons Co. v. Fulton Co., 920 F.2d 752 (11th Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2274 (1991)	2
Turner v. Fouche, 396 U.S. 346 (1970)	11
Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977)	9
Warth v. Seldin, 422 U.S. 490 (1975)	5

ARGUMENT

This Court granted review of the question of what type of injury an association must allege to have standing to challenge a racially discriminatory ordinance. Respondents would have this Court instead decide what evidence an association must enter into the record to support its verified, uncontested pleadings on an issue that is raised for the first time on appeal. Under either analysis, the ruling of the Court of Appeals for the Eleventh Circuit should be reversed.

As AGC demonstrated in its brief on the merits, its complaint should be judged by the standards appropriate for pleadings. The complaint alleged that the City of Jacksonville excluded non-minority AGC members from the bidding process for certain contracts the City awarded, and that the City based such exclusions on unconstitutional racial classifications. Those allegations establish the requisite injury-in-fact for standing under the equal protection clause.

I. Unequal Treatment in Consideration for Government Contracts Is Sufficient Injury to Establish Standing.

As Petitioner's initial brief demonstrates, the constitutional right at issue in this case, equal protection of the laws, protects simply the right to compete on an equal footing for government contracts. It does not guarantee any substantive right to those contracts, and does not concern itself with the final results of a fair bidding process.

Respondents do not refute, or even address, the argument that the only injury required for standing under the equal protection clause is discriminatory exclusion from the bidding process. *Cf., Heckler v. Mathews*, 465 U.S. 728 (1984). They present no case law justifying the Eleventh Circuit's "specific lost contract" rule. Even their supporting *amici curiae* do not defend the appellate court's decision. Brief of the States of Ohio and Michigan, pp. 11-12; Brief of National League of Cities, et al., p. 19.

Respondents' only defense of the Eleventh Circuit rule is that AGC's complaint somehow "compelled" the court to adopt it. Brief of Respondents at 22-23. Such a claim is somewhat disingenuous in light of the fact that the Eleventh Circuit adopted its "specific lost contract" standard long before it ever saw AGC's complaint. *S.J. Groves & Sons Co. v. Fulton Co.*, 920 F.2d 752 (11th Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2274 (1991); *Cone Corp. v. Florida Dept. of Transp.*, 921 F.2d 1190 (11th Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2238 (1991).

In any event, any intermittent references in AGC's complaint to economic injury could not have forced the Eleventh Circuit to adopt its rule. AGC made clear that its claim was based on the equal protection clause, Complaint, ¶ 55; R-1-1, Joint Appendix at JA-20, and that AGC members were precluded from bidding on City contracts. *Id.*, ¶¶ 9, 45, 50; JA-10, 18, 19. Courts must construe pleadings "so as to do substantial justice," Fed. R. Civ. P. 8(f), and long have considered themselves free to disregard surplus language in complaints. *See, e.g., E.I. Dupont De Nemours & Co. v. Davis*, 264 U.S. 456, 459 (1924); *Bishop & Co. v. Midland Bank*, 84 F.2d 585 (9th Cir.), *cert. denied*, 299 U.S. 587 (1936). The question is not whether the

complaint says too much, but whether it alleges all that it must.

That latter question is the crux of Respondents' brief. They silently concede the error of the Eleventh Circuit's requirement of economic injury, spending most of their brief attacking the sufficiency of AGC's complaint. That argument, too, must fail, because AGC's allegations sufficiently establish the discrimination that its members suffered.

II. Petitioner's Complaint Contains Sufficient Allegations of Immediate, Particularized Injury to Establish Standing.

Respondents argue that AGC's complaint did not establish specific injury because it did not demonstrate that AGC members were affected by the City's ordinance. To the extent that Respondents would demand proof of a specific lost contract, AGC agrees that its complaint contains no such allegations. That issue, after all, is the question that this Court originally agreed to review. To the extent, however, that Respondents contend AGC failed to establish specific, direct, and immediate discrimination against its members, they are wrong.

A. AGC's Complaint Satisfies the Standard for Construing Pleadings.

Respondents confuse the appropriate standards to be applied in this case, claiming that AGC failed to produce

evidence at the summary judgment stage.[1] Brief of Respondents, pp. 26-29. However, Respondents blithely ignore the fact that they never contested AGC's standing during that time. Respondents never raised the issue in their motion for summary judgment, R-2-33. They did not file any motions on the issue during the weeks between the Eleventh Circuit's mandate and the district court's order granting summary judgment to AGC. District Court Docket Sheet, Joint Appendix at JA-5. Nor did the record of proceedings of the pre-trial conference contain any reference to the issue of standing. R-1-61.

Given Respondents' delayed request for more evidence and the unusual posture of this case, AGC's complaint should be held to the standards appropriate for pleading, not summary judgment. Thus, this Court should "accept as true material allegations of the complaint, and . . . construe the complaint in favor of the complaining party." *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 109 (1979). AGC's complaint and the evidence in the record meet all Article III requirements for standing.

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[1] Respondents misconstrue Petitioner's brief on the merits, claiming that AGC concedes that the district court erred in granting summary judgment to AGC when it had no evidence to establish its standing. Brief of Respondents, pp. 26, 29. AGC never made such a concession. AGC simply agreed that *if* the Eleventh Circuit was correct in requiring evidence of a specific lost contract, the record contained no such evidence. Brief of Petitioner, pp. 28-31. If, however, the requisite injury is unequal treatment in the bidding process, AGC's complaint is sufficient to establish standing and the district court's decision was correct.

B. AGC's Complaint Establishes Actual Exclusion of AGC Members from the City's Bidding Process.

Respondents are entirely correct that AGC must allege a concrete, particularized injury, *Warth v. Seldin*, 422 U.S. 490, 508 (1975), that is actual and imminent, *Lujan v. Defenders of Wildlife*, ___ U.S. ___, 112 S.Ct. 2130, 2136 (1992), causally connected to the challenged ordinance, and redressable by a favorable decision. *Id.*; *Allen v. Wright*, 468 U.S. 737 (1984). AGC's complaint establishes all of these facts.

First, AGC alleged that the City's MBE program[2] set aside 10% of capital improvement funds for minority business enterprises. Complaint, ¶ 19; R-1-1; Joint Appendix at JA-12. Respondents admitted this allegation. Answer, ¶ 19, JA-27. The ordinance also established a 10% set-aside for all non-capital contracts. City of Jacksonville Purchasing Code § 126.605 (1988); R-1-5; Petition Appendix at App. 18. Projects that the City determined to be part of the set-aside were "deemed reserved for minority business enterprises only," and the projects or contracts were to be "awarded directly to minority

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[2] Respondents and their supporting *amici curiae* argue that this case is moot because the City enacted a new ordinance in October, 1992. This Court has already considered those arguments, and on December 14, 1992, denied Respondents' Motion to Dismiss as Moot.

Because the case is not moot, the proper statute to consider is the ordinance that AGC originally challenged. In any event, as AGC demonstrated in its response to the Motion to Dismiss as Moot, the two statutes are identical for purposes of standing.

business enterprises." *Id.*, §§ 126.604(c), 126.605(c); App. 18, 21.

AGC's complaint also established that its members were actually and concretely affected by these direct awards to minority businesses. AGC's members "regularly bid on and perform construction work for the City of Jacksonville." Complaint, ¶ 9; R-1-1; Joint Appendix at JA-10. AGC's non-minority members "are expressly excluded from bidding on construction contracts set aside by the City of Jacksonville." *Id.* Furthermore, "[n]umerous non-minority members of AGC would have been eligible to, and would have, bid on such designated set-aside contracts but for the restrictions imposed on such contracts by the Defendants." *Id.*, ¶ 46; JA-18.

These allegations establish that AGC members, who regularly bid on work for the City of Jacksonville, were excluded from consideration for set-aside projects and contracts. In this respect, Petitioner's complaint is indistinguishable from that in *Pennell v. City of San Jose*, 485 U.S. 1 (1988). In that challenge to a rent control ordinance, the appellees argued that the injury the individual landlord and landlord's association claimed was too speculative to confer standing. *Id.*, 485 U.S. at 6-7. They pointed out that the association had not identified any member with tenants who might trigger the ordinance, or any adverse determination that would cost money. *Id.*, 485 U.S. at 6.

This Court nevertheless found the landlords' allegations to be sufficient to establish standing:

> Here, appellants specifically alleged in their complaint that appellants' properties are

> "subject to the terms of" the Ordinance, and they stated *at oral argument* that the Association represents "most of the residential unit owners in the city and [has] many hardship tenants."

Id., 485 U.S. at 7 (emphasis added). Accordingly,

> [t]he likelihood of enforcement, with the concomitant probability that a landlord's rent will be reduced below what he or she would otherwise be able to obtain in the absence of the Ordinance, is sufficient threat of actual injury to satisfy [Article III].

Id., 485 U.S. at 8.

AGC's complaint provides much more information than the complaint that this Court found adequate in *Pennell*. Just as in that case, AGC alleged that its members are subject to Respondents' set-aside ordinance. As contractors and businesses that "regularly bid on and perform construction work for the City of Jacksonville," Complaint, ¶ 9; R-1-1; Joint Appendix at JA-10, AGC members clearly are subject to an ordinance that governs construction contracts.

Indeed, both the district court and the Respondents found AGC's allegations to be sufficient until the second trip to the appellate court. Respondents never challenged AGC's standing until after the Eleventh Circuit announced its new "economic injury" rule. Even in that appeal, their argument was that AGC lacked proof of economic injury, not that its allegations were insufficient to show actual discrimination. Initial Brief of Appellants at 26 (11th Cir. No. 90-3495). Respondents should not be permitted to argue that AGC failed to produce evidence

that neither they nor the district court considered relevant until long after the record was closed.

Respondents are ambiguous about what further evidence AGC should have ~~produce~~d in the district court. They appear to believe that the only acceptable proof of an actual injury would be a particular contract for which an eligible AGC member was not permitted to bid. Respondents' Brief at p. 13. That is a new argument in this case. At first glance, it appears to be a step short of the Eleventh Circuit's requirement that AGC must also show that the member was the low bidder but lost the contract because of the ordinance. Respondents' new rule, however, would merely require economic injury in another form.

The City of Jacksonville ordinance specifies that set-aside projects and contracts are "deemed reserved for minority business enterprises only," and are to be "awarded directly to minority business enterprises." City of Jacksonville Purchasing Code §§ 126.604(c), 126.605(c); Petition Appendix at App. 18, 21. To meet Respondents' standard, then, a non-minority AGC member would have to prepare a bid that, by law, the City could not accept or even consider.

Preparing a construction bid involves much more than signing a few sheets of paper. A contractor must review the bid specifications to determine what supplies and workmanship he or she would require to perform the project. Evaluation of some projects requires outside experts, such as geologists or engineers. The contractor must contact suppliers for prices and negotiate financial

requirements with subcontractors. Throughout the process, he or she must be aware of industry standards, legal liability laws, and local ordinances or regulations.

This process is time-consuming and expensive. Requiring that a contractor undergo it for a bid that the City is required by the law to ignore is the sort of mechanical exercise that this Court has specifically rejected. *Pennell*, 485 U.S. at 7. Nor is such a standard necessary to be sure that the plaintiffs before a court are truly injured. In the context of employment applications, this Court has stated:

> When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application.

International Broth. of Teamsters v. United States, 431 U.S. 324, 365-66 (1977).

With applications as complicated as bids for construction projects, "a court is not required to engage in undue speculation as a predicate for finding that the plaintiff has the requisite personal stake in the controversy." *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 261-62 (1977). An ordinance that stands as an "absolute barrier," *id.*, to full participation in a government-sponsored program causes actual injury to all who are subject to the ordinance.

In essence, Respondents' argument is no different from the Eleventh Circuit's rule. Respondents would substitute "specific denied bid" for "specific lost contract" as

the only adequate proof of actual injury. Either standard, however, creates an overly technical requirement that is not consistent with the principles of equal protection or the precedent of this Court.

AGC has shown that AGC members, who regularly bid on and perform contracts for the City, are directly governed by the City's set-aside ordinance. That ordinance requires the City to exclude non-minority contractors from the bidding process for certain projects. That exclusion is an actual, particularized injury sufficient for standing in this case.

C. AGC's Complaint Establishes Imminent Exclusion of AGC Members from the City's Bidding Process.

Respondents argue that AGC failed to establish imminent injury because it did not allege that any AGC member plans to bid on future contracts, or that the City would not waive the set-aside requirements for future projects. Respondents' Brief at pp. 14-15. Neither of these arguments can support the ruling below.

AGC made clear that its members "regularly bid on" City contracts, Complaint, ¶ 9; R-1-1; Joint Appendix at JA-10, and that they face continuing injury from discrimination. *Id.*, ¶¶ 50-52, JA-19-20. Anything but a strained reading of Petitioner's complaint will reveal AGC members' intent to continue to do business with the City of Jacksonville.

Similarly, it is not "unadorned speculation" to conclude that the City will enforce its ordinance against

association members. *Pennell*, 485 U.S. at 8. AGC "does not have to await the consummation of threatened injury to obtain preventive relief." *Com. of Pennsylvania v. State of West Virginia*, 262 U.S. 553, 593 (1923), quoted in *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979) (plaintiffs need not invoke election procedures to challenge constitutionality of those procedures).

Respondents' reliance on its waiver provisions amounts to little more than a claim that the City is free to ignore its ordinance. Respondents cannot seriously claim that all City projects will fall within the waiver provisions. If the ordinance has any effect, the City will set aside contracts for minority businesses. Its impact is speculative only if the City will ignore the ordinance. This Court has consistently rejected such arguments. *See, e.g., Turner v. Fouche*, 396 U.S. 346, 362 n. 23 (1970) ("Georgia can hardly urge that her county officials may be depended on to ignore a provision of state law").

Respondents' argument is nothing more than an attempt to secure affirmance of a decision that cannot be defended on its own terms. Respondents would change the rules one more time in this case and force AGC to meet yet another moving target. They would have this Court apply a standard that neither the district court nor the two panels of the Eleventh Circuit considered, and that in any event is not consistent with the precedent of this Court.

Even if this Court agrees with Respondents' criticisms of AGC's complaint, the proper remedy in this case is not affirmance of the circuit court, but a remand for further evidentiary proceedings. *Havens Realty Corp. v.*

Coleman, 455 U.S. 363, 377-78 (1982); *Gladstone Realtors*, 441 U.S. at 115. Those evidentiary proceedings, however, still would require review of the Eleventh Circuit's decision. The district court would have to know whether to require from AGC evidence of a specific lost contract, as the Eleventh Circuit mandates, or some other evidence.

In sum, the question upon which this Court granted certiorari remains the same – whether a plaintiff must identify a specific lost contract to have standing to challenge a set-aside program for government contracts. As AGC demonstrated in its brief on the merits, and as Respondents and their supporting *amici curiae* do not seriously dispute, the Eleventh Circuit rule is wrong. A plaintiff invoking the equal protection clause need only assert the injuries against which the clause protects. In this case, those injuries are exclusion on the basis of race from a government's bidding process.

AGC's complaint alleges that the City's ordinance reserves 10% of all City projects and contracts for minorities. AGC members routinely bid on and perform City contracts, and therefore are subject to that ordinance. The ordinance excludes non-minority members, on the basis of race, from equal competition for City contracts. These allegations are, and always have been, sufficient to establish injury under the equal protection clause of the United States Constitution. Nothing in the record or Respondents' brief justifies a different rule in this case.

CONCLUSION

For all of the reasons discussed herein and in Petitioner's Brief on the Merits, AGC respectfully requests that this Court reverse the ruling of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1992

NORTHEASTERN FLORIDA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA,

Petitioner,

v.

CITY OF JACKSONVILLE, FLORIDA, et al.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC., IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

IDENTITY AND INTEREST OF AMICI 1

OPINION BELOW 3

STATEMENT OF THE CASE 3

SUMMARY OF THE ARGUMENT 4

ARGUMENT 5

I. CONTRACTORS PRECLUDED FROM BIDDING ON PUBLIC CONTRACTS ON THE BASIS OF THEIR RACE HAVE STANDING TO FACIALLY CHALLENGE THE DISCRIMINATORY ORDINANCE 5

A. Race-Based Deprivation of the Opportunity to Compete Is a Distinct and Palpable Personal Injury 6

B. The Success of a Bid Is Irrelevant to a Facial Challenge to a Racially Discriminatory Program 9

C. The Excluded Contractors' Injury Is Neither Hypothetical nor Conjectural, But Is Actual and Imminent 11

TABLE OF CONTENTS--Continued

Page

II. PREPARING A BID WHEN ONE IS EXCLUDED FROM COMPETITION IS FUTILE AND IS THUS NOT REQUIRED 14

CONCLUSION 15

TABLE OF AUTHORITIES CITED

Page

Cases

Allen v. Wright, 468 U.S. 737 (1984) 6

Berkman v. City of New York, 705 F.2d 584 (2d Cir. 1983) 14-15

Brown v. Board of Education of Topeka, 347 U.S. 483 (1954) 15

Carter v. Jury Commission of Greene County, 396 U.S. 320 (1970) 12

Choctaw Manufacturing Co. v. United States, 761 F.2d 609 (11th Cir. 1985) 9

City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 (1982) 11

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 4,7,9,11

Dothard v. Rawlinson, 433 U.S. 321 (1977) 14

Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977) 7

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) 14

Lovell v. City of Griffin, 303 U.S. 444 (1938) 5

TABLE OF AUTHORITIES CITED--Continued

Page

Lujan v. Defenders of Wildlife, 504 U.S. ___, 119 L. Ed. 2d 351 (1992) 13

Lujan v. National Wildlife Federation, 497 U.S. ___, 111 L. Ed. 2d 695 (1990) 12

Meyer v. State of Nebraska, 262 U.S. 390 (1923) . . . 9

Nyquist v. Mauclet, 432 U.S. 1 (1977) 15

Plessy v. Ferguson, 163 U.S. 537 (1896) 15

Regents of the University of California v. Bakke, 438 U.S. 265 (1978) 7-9,11

S.J. Groves & Sons Co. v. Fulton County, 920 F.2d 752 (11th Cir. 1991) 9

Sims v. Georgia, 389 U.S. 404 (1967) 12

Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498 (1911) . . 10-11

Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941 (1982) 15

The Cone Corp. v. Florida Department of Transportation, 921 F.2d 1190 (11th Cir. 1991) . 9-10

Truax v. Raich, 239 U.S. 33 (1915) 9

TABLE OF AUTHORITIES CITED--Continued

Page

United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973) 11

Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) . 13

Whitmore v. Arkansas, 495 U.S. 149 (1990) 6

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 5

Statutes

42 U.S.C. § 1983 5

§ 2000d, et seq. 8

§ 2000e, et seq. 14

Rule

Supreme Court Rule 37.3 1

United States Constitution

Fourteenth Amendment 5,7,9

§ 1 5

Page

Miscellaneous

Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d, Pocket Part § 3531.4 10

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC., IN SUPPORT OF PETITIONER

IDENTITY AND INTEREST OF AMICI

Pursuant to Supreme Court Rule 37.3, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae on behalf of itself and the Associated General Contractors of California, Inc. (AGC California), in support of petitioner Northeastern Florida Chapter of the Associated General Contractors of America (AGC). Written consent to

the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Policy for PLF is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

AGC California is a nonprofit California corporation whose members include general contractors and subcontractors in the construction industry in California. AGC California has as one of its principal aims and objectives the establishment and maintenance of fair and non-discriminatory competitive bidding practices for public construction projects. AGC California is the plaintiff in a lawsuit pending in the United States District Court for the Northern District of California against the City and County of San Francisco which involves issues similar to those presented in this case.

PLF has participated in cases which involved issues similar to those presented in this matter. The Foundation's public-policy perspective and litigation experience in support of individual liberties will help provide this Court with additional argument with which to view the threat to civil rights posed by the Eleventh Circuit's ruling in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 951 F.2d 1217 (11th Cir. 1992).

STATEMENT OF THE CASE

This case presents the issue of whether an association, whose members are precluded from bidding on certain municipal contracts by a set-aside program, must show that specific contracts would have been awarded to its members but for the existence of the set-aside program in order to have standing to challenge the program.

AGC filed a verified complaint in the United States District Court for the Middle District of Florida on April 4, 1989, seeking declaratory and injunctive relief against the City of Jacksonville (City). AGC, on behalf of its members who "regularly bid on and perform construction work for the City of Jacksonville," Complaint at ¶ 9, challenged the minority business enterprise (MBE) program of the City as violative of the Equal [illegible]ion Clause of the Fourteenth Amendment and 42 U.S.[illegible] § 1981 and 1983. The MBE program sets aside 10% of the dollar amount of city contracts to be bid on and awarded solely to minority-owned business enterprises.

After the District Court issued a temporary restraining order and a preliminary injunction, the Eleventh Circuit reversed the District Court. *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville, Florida*, 896 F.2d 1283 (11th Cir. 1990) (*Northeastern I*). One member of the panel opined in

concurrence that AGC lacked standing to bring the action. *Id.* at 1287 (Tjoflat, C.J., concurring).

On May 31, 1990, AGC prevailed on cross-motions for summary judgment, the District Court finding the City's program constitutionally infirm under *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). On appeal, the Eleventh Circuit dismissed the action without prejudice for lack of standing, *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville, Florida*, 951 F.2d 1217 (11th Cir. 1992) (*Northeastern II*), based on AGC's alleged failure to demonstrate that "but for the program, any AGC member would have bid successfully for any of these contracts." *Id.* at 1219.

SUMMARY OF THE ARGUMENT

An association need not show that one of its members would have been awarded a particular contract absent an MBE set-aside program in order to facially challenge the ordinance establishing the MBE program.

To exclude contractors from bidding on contracts due to their race is to inflict a direct, personal injury upon those contractors regardless of whether any of them would otherwise be awarded a contract that was set aside. A law directed at a certain group and denying that group the opportunity to bid on contracts injures the targeted group whenever a contract is set aside. If the targets of the law seek neither money damages nor the award of a specific contract, they should not have to prove they would have received a specific contract to have standing to challenge the law on its face.

The very existence of the law barring its participation constitutes an actual, present harm to the excluded party. Requiring a party to prepare a bid for a contract that it is barred from bidding upon is to demand a costly and futile effort that ignores the injury inflicted upon those who are deterred from bidding. The fact that the party challenging the set-asides bids on and performs contracts for the city that are not set aside, but is expressly precluded from bidding on the set-asides because of race, is enough to establish standing for a facial challenge.

ARGUMENT

I

CONTRACTORS PRECLUDED FROM BIDDING ON PUBLIC CONTRACTS ON THE BASIS OF THEIR RACE HAVE STANDING TO FACIALLY CHALLENGE THE DISCRIMINATORY ORDINANCE

The Fourteenth Amendment commands: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1.[1] Actions brought under 42 U.S.C. § 1983 to vindicate this right to equal protection are not the special province of any particular racial or ethnic group. It has long been established that the guarantees of the Fourteenth Amendment "are universal in their application, to all persons . . . without regard to any differences of race, of color, or of nationality." *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

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[1] Municipal ordinances are considered state action for purposes of the Fourteenth Amendment. *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938).

The City ordinance that is the subject of the suit at bar unquestionably treats individuals differently based on their racial status. This Court has held that the stigma of being a member of a race that is subject to unequal treatment is not enough to confer standing on an individual who is not personally subject to this treatment. *See Allen v. Wright*, 468 U.S. 737, 755 (1984). The Eleventh Circuit decision presumes, however, that the very group singled out for unequal treatment, nonminority contractors who bid on public contracts, does not suffer sufficient harm to challenge the discriminatory ordinance on its face.

Standing doctrines are supposed to ensure that an Article III case or controversy exists that is suitable for adjudication, reserving court resources for parties with more than a general or academic interest in a legal issue. The constitutional component of standing requires that a plaintiff "allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen*, 468 U.S. at 751. The injury in fact must be "'distinct and palpable,' as opposed to merely '[a]bstract,' and the alleged harm must be actual or imminent, not 'conjectural' or 'hypothetical.'" *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (citations omitted). These requirements have been satisfied by AGC.

A. Race-Based Deprivation of the Opportunity to Compete Is a Distinct and Palpable Personal Injury

AGC has challenged the MBE program as facially unconstitutional, incapable of being applied in a manner consistent with the Fourteenth Amendment. No particular set-aside need be identified, for every set-aside would inflict injury. This injury results from a government prohibition on participation in a bidding process solely on the basis of a prospective bidder's race. AGC seeks, via injunctive and

declaratory relief, to protect the right of its members to compete free from racial discrimination.[2] No damages, nor award of specific contracts, are sought.

The Court in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, recognized that racial set-asides inflict injury regardless of whether any individual had a right to be awarded any particular contract. Although *Croson* involved a situation in which the set-aside requirement prevented Croson, the only firm submitting a bid, from being awarded a public contract, five members of the Court defined the constitutional right at risk in terms of process and opportunity rather than the right to be awarded a particular contract. Justice O'Connor, writing for herself, the Chief Justice, and Justices White and Kennedy explained, "[t]he Richmond Plan denies certain citizens *the opportunity to compete* for a fixed percentage of public contracts based solely upon their race." *Id.* at 493 (emphasis added) (opinion of O'Connor, J.). In a special concurrence, Justice Scalia added, "the appellee here had a constitutional right to have its bid *succeed or fail* under a decisionmaking process uninfected with racial bias." *Id.* at 528 (Scalia, J., concurring in the judgment) (emphasis added).

This Fourteenth Amendment right to compete has been recognized by the Court in another important context. In *Regents of the University of California v. Bakke*, 438 U.S.

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[2] A group seeking to derive an action out of the interests of its membership must establish that (1) its purpose is related to the affected interest; (2) an individual member has standing to bring the suit; and (3) the individual member is not indispensable to the suit. *See Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977). AGC meets each of these standards.

265 (1978), the standing of an applicant to the University of California at Davis Medical School did not turn on whether he would have been accepted but for the program. A majority of the Court concluded

> even if Bakke had been unable to prove that he would have been admitted in the absence of the special program, it would not follow that he lacked standing. The constitutional element of standing is plaintiff's demonstration of any injury to himself that is likely to be redressed by favorable decision of his claim .... The trial court found such an injury, *apart from failure to be admitted*, in the University's decision not to permit Bakke *to compete* for all 100 places in the class, simply because of his race .... Hence the constitutional requirements of Art III were met. The question of Bakke's admission vel non is merely one of relief.

Bakke, 438 U.S. at 280 n.14 (opinion of Powell, J., joined by Brennan, White, Marshall, Blackmun, JJ., 438 U.S. at 328) (emphasis added).

The other four members of the Court based their decision solely on Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.*; *Bakke*, 438 U.S. at 412 (Stevens, J., concurring in the judgment in part and dissenting in part), which expressly makes being "excluded from participation in" a program that receives federal assistance a cognizable injury. A majority of the Court, however, found the harms outlawed by Title VI to be coextensive with the Equal Protection Clause of the Fourteenth Amendment thus recognizing that being barred from competition is a potential Fourteenth Amendment violation. *See Bakke*, 438 U.S. at 287 (Powell, J.); *id.* at 325 (Brennan, White, Marshall, and Blackmun, JJ.).

It is particularly harmful for a contractor to be subject to such exclusionary laws for the pursuit of a lawful profession is a fundamental right, *Truax v. Raich*, 239 U.S. 33, 41 (1915); *Meyer v. State of Nebraska*, 262 U.S. 390, 399 (1923). The circumscription of this right on the basis of race implicates a distinct and direct constitutional injury.

B. The Success of a Bid Is Irrelevant to a Facial Challenge to a Racially Discriminatory Program

There is nothing wrong with phrasing the test of injury for standing purposes in terms of "but for" causation. The Eleventh Circuit, however, reviewing a facial challenge by a party that seeks no damages, has posed a completely irrelevant question. In light of *Croson* and *Bakke*, the more appropriate question is whether "but for the City's program, the association's members would be allowed to compete for contracts set aside by the City."

The inappropriateness of the "but for" question actually posed by the Eleventh Circuit in the opinion below is exposed by tracing its dubious pedigree within that Circuit. It first surfaced in the unremarkable context of the elements necessary for a court to award a specific contract, *Choctaw Manufacturing Co. v. United States*, 761 F.2d 609, 619 (11th Cir. 1985), then was used to deny standing when a claim for lost profits failed to specify particular contracts lost, *S.J. Groves & Sons Co. v. Fulton County*, 920 F.2d 752 (11th Cir. 1991). In *The Cone Corp. v. Florida Department of Transportation*, 921 F.2d 1190 (11th Cir. 1991), the case the *Northeastern II* court said "barred" it from finding standing, 951 F.2d at 1219, the Eleventh Circuit used legalistic legerdemain to find a facial attack unwarranted. *Cone Corp.* ruled out the possibility that the government official in question could violate the Fourteenth Amendment because "his oath of office . . . requires him to avoid such

unlawful conduct." *Cone Corp.*, 921 F.2d at 1207. Commentators have rightly described this a "particularly virtuosic display of artistry," Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d, Pocket Part § 3531.4 at 134 n.3.6 (1992). The absence of specific contracts identified to support an *as applied* challenge, coupled with the court's willing suspension of disbelief concerning the propensity of a government official to violate his oath of office, resulted in a finding of no injury on which to base standing.

It is a rather large and unwarranted leap from this history to require proof that a particular contract was undeservedly lost when a party makes a facial challenge to an ordinance. The injury supporting standing for a facial challenge need be no more than a showing that the provision attacked would injure, by its very terms, the party seeking declaratory and injunctive relief. The verified complaint makes plain that AGC's members are in the construction industry, have obtained contracts from the City in the past, and are barred solely on the basis of their race from consideration for contracts that are set aside under the challenged ordinances.[3] AGC is harmed by each contract

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[3] Amici are aware that the City has, effective October 28, 1992, replaced the MBE program herein challenged with one that sets distinct goals for black- and women-owned businesses, eliminates preferential treatment for other groups, and authorizes subcontractor participation and bid preferences in addition to set asides. The City cannot, merely by placing more discriminatory arrows in its quiver and redefining the privileged class, evade facial challenge of a set-aside program. This is a classic example of an injury that would be "capable of repetition, yet evading review" were the Court to consider AGC's challenge mooted. *Southern Pacific*
(continued)

for which its members, despite being competent participants in the industry, are not allowed to compete solely because of their race.

C. The Excluded Contractors' Injury Is Neither Hypothetical nor Conjectural But Is Actual and Imminent

While there are, of course, economic consequences when individuals are barred from competing for public contracts due to their race, the personal injury inflicted can also be considered noneconomic in nature. Noneconomic injury can be the basis for standing. See *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 686 (1973).

The Eleventh Circuit is plainly wrong in asserting that AGC "has not alleged specific noneconomic harm either." *Northeastern II*, 951 F.2d at 1220. AGC's verified complaint alleges "[n]umerous non-minority members of Plaintiff AGC would have been eligible to, and would have, bid on such designated set aside contracts but for the restrictions imposed" by the City. Complaint at ¶ 46. Being barred from consideration in bidding on the basis of race is itself an injury, regardless of the outcome of the bidding. *See Croson*, 488 U.S. at 493 (opinion of O'Connor, J.); *id.* at 529 (Scalia, J., concurring in the judgment); *cf. Bakke*, 438 U.S. at 280 n.14 (opinion of Powell, J.).

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[3] (continued)
Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498, 515 (1911). *See City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 288-89 (1982) (city's repeal of a challenged provision does not moot controversy).

The injury of exclusion is not confined to business or education. In *Carter v. Jury Commission of Greene County*, 396 U.S. 320, 329 (1970), the Court found standing for people excluded from the jury rolls based on their race. Standing was "bottomed on the simple proposition that the State, acting through its agents, has *refused to consider* the appellants for jury service solely because of their race." *Id.* at 330 (emphasis added).[4] The appellants were not required to show that they would have been selected for any particular jury.

AGC's case is distinguishable from other noneconomic harm cases in which the Court had found a lack of standing. In *Lujan v. National Wildlife Federation*, 497 U.S. ___, 111 L. Ed. 2d 695 (1990), an organization lacked standing to challenge an agency decision which had the effect of *permitting* third parties to undertake mining activity. The National Wildlife Federation (NWF) failed to specify what areas of the vast tracts of land in question were actually used by their members making it impossible for a court to determine whether the permitted activity would in fact harm NWF. *National Wildlife Federation*, 111 L. Ed. 2d at 716. By contrast, AGC's harm is from the absolute bar to competition its nonminority members face whenever a City contract is set aside. AGC is making a facial challenge to an ordinance that by its very terms excludes certain of its members.

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[4] There is a long history of challenges to the racial composition of juries on the part of criminal defendants, *see, e.g., Sims v. Georgia*, 389 U.S. 404 (1967). Application of the Eleventh Circuit rule herein challenged would absurdly base standing on a required showing that, "but for the exclusion of members of his race from the jury, petitioner would have been acquitted."

In this vein, *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), shows that proof that a particular construction contract will be awarded is not necessary to meet constitutional standing requirements. Although a number of market contingencies affected whether a housing proposal would see the light of day, "[t]he challenged action of the petitioners stands as an *absolute barrier* to constructing the housing [petitioner] had contracted to place on the [proposed] site. If [petitioner] secures the injunctive relief it seeks that barrier will be removed." *Id.* at 261 (emphasis added). Although "[a]n injunction will not, of course, guarantee" that a contract affected by other contingencies will be completed, the party seeking to construct the housing had standing to challenge the absolute bar. *Id.* The bar itself constitutes a present and on-going injury.

This is not a case in which standing is undermined by uncertainty concerning the prospects of injury. The Court in *Lujan v. Defenders of Wildlife*, 504 U.S. ___, 119 L. Ed. 2d 351 (1992), found that a lack of "concrete plans" to visit foreign lands indirectly affected by the challenged government action rendered the injury complained of neither actual nor imminent. *Defenders of Wildlife*, 119 L. Ed. 2d at 366-67.

Parties in the position of AGC's members, however, can hardly make their plans more concrete--they are located in and perform contracts for the very City that excludes them from contracting opportunities. The affected activity in AGC's case is the very activity that puts bread on the tables and roofs over the heads of its members. The nonminority contractors in AGC suffer an injury not "at some indefinite future time," *id.* at 367 n.2, but rather *every time* the City sets aside a contract on the basis of race. AGC faces an absolute bar and is injured whenever one of its members is

told by the City not to bother submitting a bid. Although AGC's members are not even allowed on the playing field, the Eleventh Circuit demands to know their score.

II

PREPARING A BID WHEN ONE IS EXCLUDED FROM COMPETITION IS FUTILE AND IS THUS NOT REQUIRED

The only way a party could satisfy the Eleventh Circuit test for standing would be to prepare a bid for a contract that is set aside. However, the MBE program on its face would not allow AGC's nonminority members to be awarded any contracts that are set aside. The refusal of members to go through the costly and time-consuming process of preparing a bid for a project that cannot by law be awarded to them should not deny them standing to seek injunctive and declaratory relief. As the Court stated in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 365-66 (1977): "When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application."

Teamsters answered the issue in this case in the clearest possible terms. "If an employer should announce his policy of discrimination by a sign reading '[Non-]Whites Only' on the hiring-office door, his victims would not be limited to the few who ignored the sign and subjected themselves to personal rebuffs." *Id.* at 365. Although *Teamsters* was a case under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, its rationale applies equally in this case. *See also Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977); *Berkman v. City of New York*, 705 F.2d 584, 594 (2d Cir. 1983) ("[t]hose who have been deterred by a

discriminatory practice from applying for employment are as much victims of discrimination as are actual applicants whom the practice has caused to be rejected").

The performance of a futile act has not been required to establish standing for facial challenges to laws in other settings. Owners of a well located in Nebraska challenged on Commerce Clause grounds a law that prohibited them from transporting their water for use on their adjoining tract of land, inside the Colorado border. *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982). Although the challenged law provided for permits to be issued if the state where the water is to be used grants reciprocal rights, Colorado did not grant these rights. *Id.* at 944. The Court held that, "appellants would not have been granted a permit had they applied for one. Their failure to submit an application therefore does not deprive them of standing to challenge the legality of the reciprocity requirement." *Id.* at 944 n.2. *See also Nyquist v. Mauclet*, 432 U.S. 1, 6 n.7 (1977) ("little is to be served by requiring [plaintiff] now to go through the formality of submitting an application for a loan, in light of the certainty of its denial").

CONCLUSION

It has been nearly four decades since the pernicious "separate but equal" doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1896), was put to rest by the Court in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954). The Eleventh Circuit decision would turn back the clock to the days when distinctions based on race were presumed valid by insulating from facial challenges government enactments that discriminate on the basis of race.

There is a distinct, personal injury to an individual who is told he need not bid for contracts because he is of the wrong race, and this injury exists regardless of whether he would ultimately be awarded the contract. The problem is with the process as much as the result. When participants in a particular industry are singled out for discrimination based solely on their race, the association that represents their interests should have standing to challenge the law that, on its face, inflicts the race-based injury. The decision of the Eleventh Circuit denying standing to challenge the racially exclusionary policies of the City of Jacksonville should be reversed.

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Respectfully submitted,

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No. 91-1721

In The
Supreme Court of the United States
October Term, 1992

NORTHEASTERN FLORIDA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA,

Petitioner,

v.

CITY OF JACKSONVILLE, FLORIDA, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICI CURIAE* PUBLIC CITIZEN, AMERICAN CIVIL LIBERTIES UNION, AND ACLU OF FLORIDA IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i
INTEREST OF *AMICI CURIAE*	1
PRIOR PROCEEDINGS	2
SUMMARY OF ARGUMENT	4
ARGUMENT	4
CONCLUSION	16

TABLE OF AUTHORITIES

Cases:

ASARCO, Inc. v. Kadish, 490 U.S. 605 (1989) 7
Baker v. Carr, 369 U.S. 186 (1962) 5
Bryant v. Yellen, 447 U.S. 352 (1980) 9
Carey v. Piphus, 435 U.S. 247 (1978) 10, 15
City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 1, 5
Cone Corp. v. Florida Department of Transportation, 921 F.2d 1190 (11th Cir. 1991) 10, 11
Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59 (1978) 9
Flast v. Cohen, 392 U.S. 83 (1968) 5
Fuentes v. Shevin, 407 U.S. 67 (1972) 15
Hunter v. Erickson, 393 U.S. 385 (1969) 8
James v. Valtierra, 402 U.S. 137 (1971) 8
Larson v. Valente, 456 U.S. 228 (1982) 7, 9
Linda R.S. v. Richard D., 410 U.S. 614 (1973) 9
McNary v. Haitian Refugee Center, 111 S. Ct. 888 (1991) 10

	Page
Northeastern Florida Chapter of Association of General Contractors v. City of Jacksonville, 896 F.2d 1283 (11th Cir. 1990)	3, 11
Northeastern Florida Chapter of Associated General Contractors v. City of Jacksonville, 951 F.2d 1217 (11th Cir. 1992)	3, 10
Planned Parenthood Association v. Kempiners, 700 F.2d 1115 (7th Cir. 1983)	14
Regents of the University of California v. Bakke, 438 U.S. 265 (1978)	4, 6, 7, 14
S.J. Groves & Sons v. Fulton County, 920 F.2d 752 (11th Cir.), *cert. denied*, 111 S. Ct. 2274 (1991)	11
Sierra Club v. Morton, 405 U.S. 727 (1972)	4
Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976)	8
Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205 (1972)	8
Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252 (1977)	4, 7
Village of Belle Terre v. Boraas, 416 U.S. 1 (1974)	8
Warth v. Seldin, 422 U.S. 490 (1975)	11, 12, 13, 14
Watt v. Energy Action Educational Foundation, 454 U.S. 151 (1981)	10
Statutes:	
Jacksonville Purchasing Code § 126.601-.613 (Former Code)	2
Jacksonville Purchasing Code § 126.601-.617 (New Code)	3, 4

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INTEREST OF *AMICI CURIAE*

Amici Public Citizen, American Civil Liberties Union, and ACLU of Florida are membership organizations that frequently challenge the legality and constitutionality of governmental action in the federal courts. In such litigation, the doctrine of standing is often raised as a bar to suit. *Amici* submit this brief because they believe that the decision of the Eleventh Circuit contravenes settled principles of standing established in this Court's decisions and erroneously constricts petitioner's right to challenge the constitutionality of the municipal action at issue in this case. *Amici* strongly oppose petitioner's claim on the merits, and believe that *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), on which petitioner's claim is based,

was wrongly decided as a matter of constitutional law. However, *amici* also believe that constitutional claims should not be dismissed by closing the courthouse doors to those with contrary views, and that the doctrine of standing is not a proper basis for dismissal of this suit. Letters of consent to the filing of this brief have been submitted to the Clerk of the Court.

PRIOR PROCEEDINGS

This case presents a constitutional challenge to sections 126.601-613 of the former City of Jacksonville Purchasing Code (Former Code), which required that ten percent of the City's contracts for capital improvements, supplies, contractual services, and professional services be set aside in every fiscal year for minority business enterprises (MBEs). The City's Chief Purchasing Officer was made responsible for identifying the contracts to be set aside in each category. After the Mayor's approval of the Chief Purchasing Officer's decisions, the set aside contracts were reserved for "minority business enterprises only," to be awarded "directly to minority business enterprises." Former Code § 126.604(c). The Former Code also contained various possibilities for a waiver or reduction of the set-aside requirements in light of, for example, the limited availability of MBEs in the contracting specialties, or the additional cost to the City of using MBEs. Former Code § 126.608.

On April 4, 1989, petitioner, an association of contractors with nonminority members that would not qualify for contracts set aside under the MBE program, filed suit against the City, asserting that the MBE program violated the Equal Protection Clause of the Fourteenth Amendment. The complaint alleged that petitioner's nonminority members would have bid on contracts reserved for MBEs, had the MBE program not been in place. Two days after the complaint was filed, the District Court issued a temporary restraining order, and, two weeks after that, issued a preliminary injunction against enforcement of the MBE program. A year later, the

preliminary injunction was reversed by the Court of Appeals for the Eleventh Circuit, which concluded that petitioner had not shown irreparable harm, because monetary relief would provide its members with an adequate remedy for any constitutional violation that might ultimately be established. *Northeastern Florida Chapter of Ass'n of General Contractors v. City of Jacksonville*, 896 F.2d 1283 (11th Cir. 1990). Chief Judge Tjoflat concurred specially on the ground that petitioner lacked standing, because, *inter alia*, it had not shown that any specific contract would have been awarded to any of its nonminority members absent the set-aside program. *Id.* at 1287-88.

On remand, the District Court granted summary judgment for petitioner and enjoined further enforcement of the ordinance. The Court of Appeals again reversed, this time adopting Chief Judge Tjoflat's view that petitioner lacked standing. In doing so, the Court emphasized that petitioner had not shown that any of its members would have bid successfully for a particular set-aside contract, but for the MBE program. *See Northeastern Florida Chapter of Associated General Contractors v. City of Jacksonville*, 951 F.2d 1217 (11th Cir. 1992). This Court granted certiorari on October 5, 1992.

On October 27, 1992, the City Council of Jacksonville enacted an ordinance repealing the MBE program challenged in this suit and enacting a new African-American and Women's Business Enterprise Program. Ordinance No. 92-1269-1132, *to be codified in part at* Jacksonville Purchasing Code § 126.601-.617 (New Code). The ordinance became effective the next day, upon the Mayor's signature. The New Code establishes separate "participation policy goals" in four kinds of City contracts for business enterprises owned by African-Americans and Women (AWBEs), New Code § 126.604(a), and states that these goals "shall be used as guidelines and shall not be construed as a ceiling or floor" to AWBE participation, *id.* § 126.604(c). The New Code puts in place four alternative methods of achieving the participation goals, *viz.*, by

awarding a contract to the lowest responsible bidder who meets specific participation percentages or has made a good faith effort to do so, by setting aside contracts for bidding only by AWBEs when there are at least two AWBEs available to perform the contract, by directly negotiating small professional-service contracts with AWBEs, and by granting a bid preference for AWBEs. New Code § 126.605. The New Code also contains various provisions for a waiver or modification of the participation percentage goals.[1]

SUMMARY OF ARGUMENT

In *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), and *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977), this Court ruled that a party challenging the constitutionality of a government requirement for obtaining a desired benefit as racially discriminatory need not show, as a condition of standing to sue, that it would have obtained the benefit, but for the exclusionary practice. Fundamental fairness requires that this principle apply equally to all litigants, regardless of the side they are taking in any particular controversy. The decision below must be reversed because it disregards this rule of even-handedness, which is essential to any proper application of the standing doctrine.

ARGUMENT

The rules of standing ensure that "a party has a sufficient stake in an otherwise justiciable controversy to obtain [its] judicial resolution." *Sierra Club v. Morton*, 405 U.S. 727, 731 (1972). Those rules are a threshold for consideration of a case on the merits, not a substitute for it. As this Court has observed, "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *Flast v. Cohen*, 392 U.S. 83, 99 (1968). Thus, the gist of the standing question is whether the plaintiff has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962). A plaintiff who has a sufficient stake in the outcome to meet the requirements of Article III is entitled to go forward. Whether the plaintiff can prevail on the merits is, of course, an entirely different question.

Here, petitioner's claim on the merits is that Jacksonville's MBE set-aside program is inconsistent with this Court's decision in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). *Amici* believe that the decision in *Croson* is fundamentally flawed in its failure to recognize a constitutional distinction between programs designed to perpetuate past discrimination and those designed to eliminate its remaining vestiges. But *amici* believe with equal conviction that the answer to the constitutional dispute over set-aside programs does not lie in closing the courthouse door to those seeking redress for their injuries.[2]

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[1] *Amici* recognize that the City's recent repeal of its old set-aside program and enactment of a quite different program based on participation percentage goals raise a substantial question whether a live controversy remains in this case. Nevertheless, *amici* submit this brief in case the Court reaches the standing issue, because of our belief that the standing decisions of the Eleventh Circuit are incorrect.

[2] The term "injury" in this context must be carefully defined. *Amici* agree that petitioner has alleged an injury in fact sufficient to confer standing. *Amici* do not agree that the competitive disadvantage that petitioner has alleged rises to the level of a constitutional injury under the appropriate equal protection analysis. Specifically, *amici* disagree with the strict scrutiny test adopted in *Croson*. As Justice Brennan has noted, "whites as a class [do not] have any of the 'traditional indicia of suspectness: the class is not saddled with such

(continued...)

The decision below dismisses a constitutional challenge that we, as *amici*, would be likely to resist if and when a court reached the merits of the challenge. In our view, however, it rejects petitioner's claims through the wrong means. The decision below does more than foreclose these claims; it reflects a cramped conception of standing that can and will deny a legitimate day in court to other litigants, some of whom we represent and some of whom we oppose. In any event, the decision cannot be reconciled with the relevant decisions of this Court or with our constitutional traditions.

Specifically, the decision below conflicts directly with *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). In *Bakke*, a white man who had been denied admission to a state medical school alleged that the school's practice of reserving 16 of 100 places in its entering class for minority applicants denied him the equal protection of the laws. In this Court, several *amici* suggested that Bakke lacked standing to sue because he had not shown that he would have been admitted to the medical school, but for the special admissions program for minority applicants.[3] This Court rejected that contention:

[2](...continued)
disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'" *Bakke*, 438 U.S. at 357 (opinion concurring in judgment in part and dissenting in part) (citations omitted).

[3] The California Superior Court had refused to order Bakke's admission on that ground, even though it ruled that the special admissions program violated the Equal Protection Clause. 438 U.S. at 279. The California Supreme Court affirmed the Superior Court's holding that the admissions program was unconstitutional and placed the burden of proof on the school to show that Bakke would not have been admitted absent the program. The school subsequently conceded that it could not carry this burden, *id.* at 280, but this Court noted that Bakke would have had standing even absent this concession, *id.* at 280-81 n.14.

> [E]ven if Bakke had been unable to prove that he would have been admitted in the absence of the special program, it would not follow that he lacked standing. The constitutional element of standing is plaintiff's demonstration of any injury to himself that is likely to be redressed by a favorable decision of his claim. . . The trial court found such an injury, apart from failure to be admitted, in the University's decision not to permit Bakke to compete for all 100 places in the class, simply because of his race. . . . Hence the constitutional requirements of Art. III were met. The question of Bakke's admission *vel non* is merely one of relief.

438 U.S. at 280-81 n.14 (citation omitted). Thus, this Court found Article III jurisdiction satisfied by Bakke's claim of injury in not being permitted to compete for all the positions in the entering class.[4]

In *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977), a residential property developer seeking to build housing for low- and moderate-income residents challenged a municipality's zoning practices, alleging that the defendant's refusal to rezone land from single-family to multiple-family use was racially discriminatory. The village challenged the developer's standing to sue, arguing that

[4] This Court subsequently cited *Bakke* as good law in *Larson v. Valente*, 456 U.S. 228, 244 n.15 (1982). However, in light of *ASARCO, Inc. v. Kadish*, 490 U.S. 605 (1989), it may be questioned whether this aspect of *Bakke* is dictum. *ASARCO* makes clear that the University of California would have had standing to seek this Court's review of the California Supreme Court's adverse judgment, even if Bakke had not had standing to sue in the first place, and that the University's standing would have been sufficient to sustain this Court's Article III jurisdiction. It might also be argued that, under *ASARCO*, the University's standing would have been necessary for jurisdiction. Nevertheless, this Court did hold that Bakke had standing, and that his standing was sufficient for Article III jurisdiction. That holding should be reaffirmed.

the project's assumed source of government funding had been eliminated, and that many contingencies stood between the zoning decision and the eventual construction of the project. This Court agreed that "[a]n injunction would not, of course, guarantee that [the housing project] will be built," 429 U.S. at 261, but concluded that the developer's wish to proceed with plans for a specific project was an adequate factual predicate for the personal stake in the controversy necessary to support Article III standing, whether or not the eventual construction of the project was assured. *Id.*

In other cases, this Court has not questioned the standing of plaintiffs to challenge exclusionary zoning and housing practices that burdened minority and low-income persons, even though there was no showing that those persons would necessarily be able to find the desired housing absent the allegedly discriminatory practice. *See, e.g., Hunter v. Erickson*, 393 U.S. 385 (1969) (challenge to city charter amendment restricting fair housing ordinance; no showing that plaintiff would be able to purchase desired housing); *James v. Valtierra*, 402 U.S. 137 (1971) (challenge to referendum restricting low-cost housing proposals; no showing that plaintiffs would necessarily obtain such housing absent referendum); *cf. Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), and *id.* at 10 (Brennan, J., dissenting) (challenge to law against occupancy of houses by unrelated family members; no showing that landlords would be able to rent house in the future to tenants excluded by the ordinance); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972) (challenge by tenants to landlord's discriminatory rental practices, on ground that it prevented nonwhite persons from becoming neighbors; no showing that specific nonwhites were interested in renting apartments).

These decisions are in harmony with this Court's general standing principles. At the core of these decisions is the issue of redressability; in every case, the plaintiff must show "an injury to himself that is likely to be redressed by a favorable decision." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976); *see also Linda R.S. v. Richard D.*, 410 U.S. 614, 618 (1973). But, as this Court has made clear, the doctrine of standing does not require the plaintiff to show that a favorable decision will relieve "his *every* injury." *Larson v. Valente*, 456 U.S. 228, 244 n.15 (1982) (citing *Bakke*). Rather, the plaintiff need show only that a favorable decision will be likely to remove *an obstacle* to its obtaining an ultimate goal — be it the award of a government benefit, or the achievement of some other goal, which is impeded by the challenged governmental action. *Id.*; *see Duke Power Co. v. Carolina Env'tal Study Group*, 438 U.S. 59, 75 n.20 (1978) (no more than "substantial likelihood" of redress required). No "[s]peculative inferences," *Simon*, 426 U.S. at 45, are necessary here; if the Jacksonville set-aside program is invalidated, then petitioner's members will be able to compete for a larger number of Jacksonville contracts than at present, and that will make it more likely that they will be awarded such contracts in the future.

This Court has frequently found standing in parties who challenged the legality of a governmental action or regulation that stood as an obstacle to their achieving a goal, even where there was no showing that the removal of that obstacle would make accomplishment of their ultimate goal a certainty. For example, in *Bryant v. Yellen*, 447 U.S. 352 (1980), farmworkers in the Imperial Valley of California intervened in a lawsuit between the United States and California to seek a declaratory judgment that a federal statute prohibited delivery of reclamation project water to any privately owned irrigable land in excess of 160 acres. The farmworkers desired to purchase land in the Valley, and they believed that if the statute were construed as they believed it should be, landowners who held more than 160 acres would place excess land on the market. Relying on *Arlington Heights*, *supra*, this Court ruled that the farmworkers had standing, "even though they could not with certainty establish that they would be able to purchase excess lands if [the statute] were held applicable." 447 U.S. at 367.

In *Watt v. Energy Action Educational Foundation*, 454 U.S. 151 (1981), the Court ruled that California had standing to challenge the Department of Interior's refusal to employ experimental methods of awarding leases for offshore oil drilling, as violative of a federal statute. The Interior Department argued that California had no standing to sue because, even if the Department were statutorily required to use the experimental methods in some cases, there was nothing to indicate that the Department would try these systems on parcels leased off the California coast. *Id.* at 161. This Court rejected the Government's standing defense because a ruling in California's favor would have made it more likely, albeit not certain, that the Government would use the experimental methods favored by California. *Id.* at 161-62.

Similarly, this Court has never required plaintiffs who challenge procedural irregularities in government programs to show that they would undoubtedly achieve their ultimate goal, but for those irregularities. For example, in *McNary v. Haitian Refugee Center*, 111 S. Ct. 888, 895 (1991), the Court observed that undocumented aliens challenging the Government's procedures for awarding special agricultural worker (SAW) status had alleged injury in fact, even though the aliens were challenging only the procedures used, and not any determination that any individual alien was entitled to SAW status. *Cf. Carey v. Piphus*, 435 U.S. 247, 266-67 (1978) (violation of procedural due process in suspension from public school is compensable by nominal damages, even if student's suspension is substantively justified).

Despite this substantial and consistent body of law, the Eleventh Circuit has held, in a series of cases culminating in the decision below, that a contractor bringing an Equal Protection challenge to a minority preference program for municipal contracts must show that it would have been awarded one of the contracts, but for the preference program. *See Northeastern Florida Chapter of Associated General Contractors v. City of Jacksonville*, 951 F.2d 1217 (11th Cir. 1992); *Cone Corp. v. Florida Dep't of Transportation*, 921 F.2d 1190, 1204-07 (11th Cir. 1991); *S.J. Groves & Sons v. Fulton County*, 920 F.2d 752, 758 (11th Cir.), *cert. denied*, 111 S. Ct. 2274 (1991). This conclusion rests ultimately on an erroneous reading of *Warth v. Seldin*, 422 U.S. 490 (1975).[5]

Relying squarely on *Warth*, the Eleventh Circuit suggested in *S.J. Groves* that a contractor must be able to point to a specific contract that it would have been awarded, but for the defendant's MBE program. 920 F.2d at 758; *see also Northeastern Florida Chapter of Ass'n of General Contractors v. City of Jacksonville*, 896 F.2d at 1287 (Tjoflat, C.J., concurring) (same reading of *Warth*). That is not what this Court held in *Warth*, however. In *Warth*, the Court concluded that various parties, including property developers who wished to build low-income housing projects, lacked standing to challenge a municipality's allegedly discriminatory zoning practices. The Court did not say that the developers were required to show that the desired zoning would have been granted, or that any projects would have been built, but for the zoning ordinance and its implementation. Rather, the Court concluded that developers lacked standing to challenge the municipal zoning ordinance because they had not even shown that the municipality's zoning practices had impeded the construction of any housing project:

> [Home Builders'] complaint refers to no specific project of any of its members that is currently precluded either by the ordinance or by respondents' action in enforcing it. There is no averment

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[5] In the decision below, the Eleventh Circuit concluded that it was bound by the Circuit precedent of *Cone Corp. v. Florida Department of Transportation*, 921 F.2d 1190 (11th Cir. 1991). *Cone*, in effect, adopted the position proposed by Chief Judge Tjoflat in his earlier concurring opinion in this case. *See Northeastern Florida Chapter of Ass'n of General Contractors v. City of Jacksonville*, 896 F.2d at 1287-88. Chief Judge Tjoflat's concurrence relied heavily on *Warth*, as did the Eleventh Circuit's decision in *S.J. Groves & Sons v. Fulton County*, 920 F.2d 752, 758 (11th Cir. 1991), *cert. denied*, 111 S. Ct. 2274 (1991).

> that any member has applied to respondents for a building permit or a variance with respect to any current project. Indeed, there is no indication that respondents have delayed or thwarted any project currently proposed by Home Builders' members, or that any of its members has taken advantage of the remedial processes available under the ordinance.

422 U.S. at 516.

Notably, *Warth* did not say that if one of Home Builders' members did seek a variance that would have been denied by the municipality for discriminatory reasons, Home Builders would nevertheless not have had standing to sue, merely because that developer might eventually fail to obtain a variance for some other, unforeseen reason. Yet that is essentially petitioner's situation here. Unlike the case of Home Builders, there is no doubt that the set-aside program has "delayed or thwarted" the ability of petitioner's members to obtain contracts reserved for MBEs, even though they might not ultimately be awarded any of the contracts.

In *Warth*, the Court also held that a non-profit housing council lacked standing to sue because, with one exception, its complaint "[did] not suggest that any of these groups has focused its efforts on Penfield or has any specific plan to do so[;] . . . [n]either the complaint nor any materials of any record indicate that any member of Housing Council has taken any step toward building housing in Penfield, or has had dealings of any nature with respondents." 422 U.S. at 516-17. That holding also did not require the Housing Council to show that it would ultimately have been able to build housing in Penfield; it only required the Housing Council to show that the municipality impeded its efforts to build specific projects.

In short, what this Court required in *Warth* was that the plaintiffs demonstrate that they had taken steps towards the construction of particular projects, and that the defendants had interfered with those projects' construction — not that the projects would have been built,

or even that the zoning would have been granted, absent the alleged racial discrimination.[6]

This is not to say that petitioner has no burden under the doctrine of standing. To satisfy *Warth*, it must show that its members would bid on Jacksonville contracts reserved for MBEs under the set-aside program, and that the program substantially impedes their being awarded such contracts. On the face of its complaint, petitioner has satisfied both requirements by alleging that its members regularly bid on City contracts, some of which were reserved for MBEs under the set-aside program, and that they would bid on designated construction and procurement contracts in the future, were they not reserved for MBEs. Pet. for Cert. 10-11. Although the Former Code contained provisions for waiver and modification of the set-aside requirements, respondent did not dispute that the program substantially impeded an award

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[6] *Warth* may have required other plaintiffs, individuals who desired low-cost housing in Penfield, to show that low-cost housing would have been built, but for Penfield's alleged racial discrimination in zoning. 422 U.S. at 506. But the Court made clear that this special burden was necessary because those individuals were alleging only indirect injury, in that the zoning ordinance operated directly against the home builders, not themselves. Thus, the individual plaintiffs were required, in effect, to negate the possibility that the economics of the housing market, not Penfield's assertedly illegal acts, constricted low-income housing supply. Referring to the requirement of redressability in standing, the Court stressed that allegations of indirect injury "may make it substantially more difficult to meet the minimum requirement of Art. III: to establish that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm." *Id.* at 505. Here, the contractors have alleged a direct injury against themselves caused by Jacksonville's set-aside program.

of any reserved contracts to petitioner's nonminority members.[7]

In addition, a contractor would not have standing to challenge the set-aside program if it were categorically excluded from obtaining contracts for some other, concededly valid reason. In such a case, invalidation of the set-aside program could not redress the injury to the contractor. Again, *Bakke* presents an apposite analogy. As Judge Posner has pointed out: "If a public university had a policy of not admitting any blacks to its medical school, a black would not lack standing to challenge the constitutionality of this policy merely because he might not be admitted if the policy were abandoned. But he would not have standing if he was two years old." *Planned Parenthood Ass'n v. Kempiners*, 700 F.2d 1115, 1137 (7th Cir. 1983) (separate opinion) (citation omitted). Thus, a contractor that failed to meet neutrally applicable bonding requirements and would unquestionably be denied municipal contracts for that reason alone would not have standing to challenge the set-aside program.[8]

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[7] Of course, the initial standing judgment can be reversed if the evidence does not conform to the pleadings. *Warth*, 422 U.S. at 501-02. Moreover, petitioner's members are not necessarily entitled to either a judicial award of a contract or monetary relief, even if petitioner has standing and ultimately prevails on the merits of its equal protection claim. If, on remand, it appears that petitioner's members would not have won any contracts, even absent the set-aside program, then the District Court can limit the remedy to a declaratory judgment and a prohibitory injunction against future enforcement of the program. As the Court noted in *Bakke*, these issues are more appropriately addressed as questions of remedy. 438 U.S. at 281 n.14.

[8] By contrast, this Court has made clear that plaintiffs challenging a government procedure as violative of constitutional guarantees of procedural due process need not show that they would have received the desired government benefit, or would not have been sanctioned, had proper procedures been in place. This Court has recognized the denial of procedural due process as an injury, in and of itself, to an (continued...)

There may also be different standing problems presented by challenges to other kinds of minority enterprise programs. Petitioner may have to make a different showing if it seeks to challenge the constitutionality of Jacksonville's new AWBE program. In any event, this case, as it has been framed so far, presents no such complications. The only issue in this case is whether a contractor challenging a set-aside program must show that it would have been awarded a specific contract, but for the program. Under this Court's precedents, the answer is clearly that a contractor does not have to make such a showing. This Court should therefore conclude that petitioner has standing.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

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[8](...continued)
"absolute" right, "in the sense that it does not depend upon the merits of a claimant's substantive assertions." *Carey v. Piphus*, 435 U.S. at 266. "It is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest is at stake, whatever the ultimate outcome of a hearing ...." *Fuentes v. Shevin*, 407 U.S. 67, 87 (1972).

Respectfully submitted,

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November 19, 1992

Supreme Court, U.S.
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No. 91-1721

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

NORTHEASTERN FLORIDA CHAPTER
OF THE ASSOCIATED GENERAL
CONTRACTORS OF AMERICA,
Petitioner,

v.

CITY OF JACKSONVILLE, FLORIDA and
ED AUSTIN, in his official capacity as
Mayor of the City of Jacksonville,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEAL FOR
THE ELEVENTH CIRCUIT

RESPONDENTS', CITY OF JACKSONVILLE,
FLORIDA AND ED AUSTIN,
MOTION TO DISMISS AS MOOT

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LIST OF INTERESTED PARTIES

Only those parties listed in the caption were parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit.[1] None of the parties has any parent companies or subsidiaries. Petitioner is affiliated with the Associated General Contractors of America, a non-profit corporation.

[1]Tommy Hazouri is no longer Mayor of the City of Jacksonville. Petitioner and Respondent have substituted the current Mayor, Ed Austin, in the caption of this case pursuant to Rule 35.3 of the Rules of the Supreme Court.

TABLE OF CONTENTS

List of Interested Parties i

Table of Authorities iii

Motion to Dismiss as Moot 1

Memorandum of Law 5

Conclusion 13

Appendix to Motion to Dismiss as Moot A-2

TABLE OF AUTHORITIES

CASES **PAGES**

Berry v. Davis, 242 U.S. 468 (1917) 5

Board of Public Utility Comrs. v. Compania General De Tabacos De Filipinas, 249 U.S. 425 (1919) 5

Bryan v. Austin, 354 U.S. 933 (1957) 5

City of Richmond v. J. A. Croson Company, 488 U.S. 469, (1989) 5, 6, 8, 9

Diffenderfer v. Central Baptist Church, 404 U.S. 412 (1972) 5, 6, 7

Duke Power Co. v. Greenwood, 299 U.S. 259 (1936) 12

Hall v. Beals, 396 U.S. 45 (1969) . . 7

Los Angeles v. Lyons, 461 U.S. 95, 109 (1983) 7

Murphy v. Hunt, 455 U.S. 478, (1982) 7

New Orleans Flour Inspectors v. Glover, 160 U.S. 170 (1895) . . 5

Roe v. Wade, 410 U.S. 113 (1973) . . 6

Weinstein v. Bradford, 423 U.S. 147 (1975) 7

STATUTES AND OTHER AUTHORITIES

Rule 35.3, Rules of the Supreme Court . . . . . i, 1

Rule 21, Rules of the Supreme Court 1

Jacksonville Ordinance Code

Ordinance 83-1200-647 . . . . . 2, 3

Ordinance 88-37-143 . . . . . 2, 3

Ordinance 92-1269-1132 . . . . 2, 3

Ordinance 92-1464-1133 2

Repealed Section 126.603 10

Repealed Section 126.604 10

Repealed Section 126.605 10

Section 126.601 4

Section 126.605 (a)(b)(c)(d) 10, 11, 12

Section 126.609 12

Section 126.617 9

Section 126.618 . . . . . 10, 11

No. 91-1721

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

NORTHEASTERN FLORIDA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA,
Petitioner,

v.

CITY OF JACKSONVILLE, FLORIDA and ED AUSTIN, in his official capacity as Mayor of the City of Jacksonville,
Respondents.

RESPONDENTS' CITY OF JACKSONVILLE AND ED AUSTIN, MOTION TO DISMISS AS MOOT

Respondents, City of Jacksonville, Florida and Ed Austin[2] (hereinafter the "City"), move to dismiss this appeal in accordance with Rule 21, Rules of the Supreme Court of the United States, on the ground that the challenged ordinance has been repealed, thereby

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[2]Tommy Hazouri is no longer Mayor of the City of Jacksonville. Petitioner and Respondent have substituted the current Mayor, Ed Austin, in the caption of this case pursuant to Rule 35.3 of the Rules of the Supreme Court.

rendering the appeal of this case moot. In support thereof the City further states as follows:

1. The case involves the Petitioner's, Northeastern Florida Chapter of the Associated General Contractors of America (hereinafter the "AGC"), constitutional challenge to the City's ordinance which provided affirmative action for minority businesses in city contracting. Appendix to the Petition for Writ of Certiorari, App. 14-27; Ordinance 83-1200-647, as amended by Ordinance 88-37-143. The AGC sought injunctive relief including a permanent injunction enjoining the City from further enforcing the ordinance. No award of damages was sought.

2. On October 27, 1992, the Jacksonville City Council enacted Ordinances 92-1269-1132 and 92-1464-1133.

Appendix to this Motion to Dismiss as Moot, A:4-76. Ordinance 92-1269-1132 expressly repealed Part 6, Chapter 126 of the Jacksonville Ordinance Code, that is, Ordinance 83-1200-647, as amended by Ordinance 88-37-143. A:6, Section 1. The Mayor approved the new ordinances on October 28, 1992. A:61, 76. These ordinances also promulgated a new affirmative action program exclusively for African-American and women business participation in city contracting.

3. The new ordinances are predicated upon *inter alia* an independent study commissioned by the City of Jacksonville, completed in November of 1990; numerous public hearings conducted by a Select Committee of the Jacksonville City Council, held during 1991-1992; and findings made by the Select Committee, on May 22, 1991, which were expressly adopted

by the City Council in the recent enactments. A:7-8, Section 126.601.

MEMORANDUM OF LAW

The recent repeal of the challenged ordinance by the Jacksonville City Council has rendered the appeal of this case moot. *New Orleans Flour Inspectors v. Glover*, 160 U.S. 170 (1895); *Berry v. Davis*, 242 U.S. 468, (1917); *Board of Public Utility Comrs. v. Compania General De Tabacos De Filipinas*, 249 U.S. 425 (1919); *Bryan v. Austin*, 354 U.S. 933 (1957); *Diffenderfer v. Central Baptist Church*, 404 U.S. 412 (1972).

In the momentous case of *City of Richmond v. J. A. Croson Company*, 488 U.S. 469, 478, n.1 (1989), the Supreme Court held that the case was not moot even though the ordinance had expired in that there remained a live controversy between the parties over the issue of damages. In the present case, the AGC sought

injunctive relief. Unlike the *Croson* case, there was no claim for damages herein. The subsequent repeal of the ordinance has thus ended the live controversy between the parties.

The Court should dismiss the case in light of the law as it now stands, not as it stood when the judgment was entered. *Diffenderfer v. Central Baptist Church*, *supra* 404 U.S. 412, 414; *Roe v. Wade*, 410 U.S. 113, 125 (1973). As is its usual practice, the Supreme Court in *Diffenderfer* dismissed the case as moot because the relief sought in the complaint was no longer proper in view of the subject statute's repeal. As the Court stated: "The case has therefore lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract provisions of law." *Diffenderfer v.*

Central Baptist Church, *supra* 404 U.S. 412, 414, citing *Hall v. Beals*, 396 U.S. 45, 48 (1969).

In exceptional circumstances, an appeal is not rendered moot under the test of "capable of repetition, yet evading review". *Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983). Under this exception, a case is not moot when the challenged action is in its duration too short to be fully litigated prior to its cessation and there is a reasonable expectation that the same complaining party would be subjected to the same action again. *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) citing *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). The present case does not fit into the narrow exceptions to the mootness doctrine carved out by this Court in that there is no reasonable likelihood that AGC will be subjected again to the repealed ordinance.

In the district court below, the AGC attacked the pre-*Croson* ordinance. It successfully moved for summary judgment on the ground that the repealed ordinance failed to conform to the requirements of the *Croson* case, because prior to the enactment, the City did not conduct a formal study as to the existence of discrimination within its jurisdiction.[1] The new ordinances do not lack this alleged deficiency. These post-*Croson* ordinances were developed in an extensive

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[1]Throughout the litigation, the City has and continues to contest this contemporaneous finding or formal study requirement which was imposed by the district court's reading of *City of Richmond v. J.A. Croson*, *supra*, 488 U.S. 469, because it flies squarely in the face of traditional legislative domain. Such a requirement that a certain type of legislative fact-finding precede any enactment is an unwarranted encroachment by the judiciary into the law-making process. Evidentiary support for an enactment should only become necessary when challenged in court. In any event, this controversy has been mooted by the City's repeal.

and time-consuming legislative process guided by the requirements of the Supreme Court's holding in *City of Richmond v. J. A. Croson*, *supra* 488 U.S. 469. They were enacted after numerous public hearings and an independent study conducted to ascertain whether a compelling state interest existed to support the proposed remedial relief. Accordingly, the AGC cannot be subjected again to the same alleged illegality occasioned by the circumstances surrounding the enactment of the repealed pre-*Croson* ordinance.

In addition, the new ordinances completely replace the old one. The City's new affirmative action program is a ten-year plan seeking to remedy the present effects of past discrimination against African Americans and women in the Jacksonville business community. A:58-59, Section 126.617. The repealed ordinance

provided remedial relief for additional minority groups which included Spanish-Speaking Americans, Orientals, Indians, Eskimos, Aleuts and the handicapped. Appendix to the Petition for Writ of Certiorari; App. 15, repealed Section 126.603. The new ordinances further provide, on a project by project basis, for five alternative approaches to achieving the program goals of dismantling racial and gender barriers existing in the local business community. A:20-30, 63-70, Sections 126.605(a)(b)(c)(d) and 126.618. The repealed ordinance set-aside up to ten percent of city contracting for all the above listed minority groups. App. 15-21, repealed Sections 126.604 and 126.605. Accordingly, the substantive changes between the repealed and new ordinances require that the mootness doctrine not be abandoned in this instance.

Moreover, the AGC seeks a ruling on the Writ of Certiorari as to whether the association had established standing to challenge the repealed ordinance by claiming that it denies the AGC an opportunity to compete for contracts.[4] However, this issue no longer presents a live controversy. Under the new ordinances, all bidders are unquestionably permitted to compete for city contracting under the five different alternative plans. A-:20-30, 63-70, Sections 126.605(a)(b)(c)(d) and 126.618. In particular, a non-certified contractor may compete as a certified African American or women contractor in a joint-venture enterprise relationship. A:25-29, 39-43,

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[4]The City maintains that the AGC failed to prove that the repealed ordinance necessarily precluded its members from receiving contracts and also failed to prove that there was a substantial probability that its members would receive contracts in the absence of the repealed ordinance.

Sections 126.605(b)(c)(d) and 126.609. In any event, the issue of the showing necessary for constitutional standing to challenge the new ordinances is not presently before this Court.

For this Court to decide the standing question, after the repeal of the ordinance, would be to adjudicate a purely hypothetical question because there no longer remains a viable controversy as to the repealed ordinance. Where the controversy becomes moot, it is the "duty" of the appellate court to ultimately dismiss the case. *Duke Power Co. v. Greenwood*, 299 U.S. 259, 267 (1936). Accordingly, the Court should refrain from issuing an advisory opinion on the issues of standing and/or validity of the repealed ordinance at this time.

CONCLUSION

Respondents', City of Jacksonville and Ed Austin, respectfully request an order dismissing the case as moot, and alternatively, in the event the motion is denied, grant to the City an enlargement of time to file the Respondents' brief on the merits.[5]

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[5]The undersigned counsel is well aware of the Office of the Clerk's Note in the Memorandum to Counsel in Cases Granted Review on October 5, 1992 that extensions of time to file briefs on the merits will not be entertained in this case. However, in view of the intervening repeal of the subject ordinance on October 28, 1992, the Respondents' request for an enlargement of time to file its brief, is in the interests of judicial economy and will control further time, expenses and costs in this matter. It should be noted that counsel of record for the AGC has been kept apprised of these developments.

Respectfully submitted,

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No. 91-1721

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APPENDIX TO
MOTION TO DISMISS AS MOOT

INDEX TO APPENDICES

Certificate of Authentication A-3

Ordinance 92-1269-1132 . . . . . A-4

Ordinance 92-1464-1133 . . . . . A-62

ORDINANCE CERTIFICATION

I HEREBY CERTIFY that the following is a true and correct copy of Ordinance 92-1269-1132 and Ordinance 92-1464-1133, enacted by the Council of the City of Jacksonville, Florida, and a true and correct copy of a Certification relating thereto, which ordinances became effective at the time and in the manner set forth in the Certificate of Authentication.

WITNESS MY HAND and the Seal of the City of Jacksonville, Florida, this 16th day of November, 1992.

ATTEST:

Kathleen A. Roberts

KATHLEEN A. ROBERTS
Assistant Council Secretary
Legislative Records

CITY OF JACKSONVILLE FLORIDA

Council Member Jones' Substitute for File #92-1269:

AN ORDINANCE CONCERNING PURCHASING AND PROCUREMENT; REPEALING PART 6, CHAPTER 126, *ORDINANCE CODE*, AND ADDING A NEW PART CONCERNING AFRICAN-AMERICAN AND WOMEN'S BUSINESS ENTERPRISE PARTICIPATION TO BE KNOWN AS THE EQUAL BUSINESS OPPORTUNITY PROGRAM; MAKING LEGISLATIVE FINDINGS AND POLICY STATEMENT; PROVIDING FOR APPLICABILITY; PROVIDING DEFINITIONS; ESTABLISHING PARTICIPATION GOALS; ESTABLISHING ALTERNATIVE METHODS OF ACHIEVING GOALS PROVIDING FOR

CERTIFICATION OF AFRICAN-AMERICAN AND WOMEN'S BUSINESSES; PROVIDING FOR AFRICAN-AMERICAN AND WOMEN'S BUSINESS SUBCONTRACTORS; PROVIDING FOR PAYMENT OF SUBCONTRACTORS; PROVIDING FOR AFRICAN-AMERICAN AND WOMEN'S BUSINESS ENTERPRISE JOINT VENTURES; PROVIDING FOR GRADUATION FROM PARTICIPATION; PROVIDING FOR REVIEW OF CERTIFICATION; ESTABLISHING GOOD FAITH EFFORTS; PROVIDING FOR MONITORING; ESTABLISHING PENALTIES; PROVIDING THAT OTHER PROVISIONS OF THE PURCHASING CODE SHALL APPLY; ESTABLISHING POLICIES AND PROCEDURES FOR

IMPLEMENTATION OF THE EQUAL BUSINESS OPPORTUNITY PROGRAM, REPEAL AND SAVINGS CLAUSE; PROVIDING FOR SEVERABILITY; PROVIDING AN EFFECTIVE DATE.

BE IT ORDAINED by the Council of the City of Jacksonville:

Section 1. Repeal of existing Part 6, Chapter 126, Ordinance Code and adding a new Part 6, Chapter 126, Ordinance Code. Part 6, Chapter 126, Ordinance Code, is hereby repealed and a new Part 6, is added to Chapter 126, Ordinance Code, to read as follows:

Part 6. African-American and Women's Business Enterprise Participation.

126.601 Legislative Findings and Policy Statement.

(a) The findings made by the Select Committee on Minority Business Enterprise, after numerous public hearings, are hereby adopted by the Council. These findings, bearing the date of May 22, 1991 are on file with the Council Secretary and by reference are incorporated herein as if set out in their entirety.

(b) It is the policy of the City of Jacksonville to ensure the equitable participation of African-American and Women's Business Enterprises in providing capital improvements, supplies, services and

professional services to the City. The goal of this ordinance is to increase the use of African-American and Women's Business Enterprises to a level comparable with their availability. This ordinance is designed to remedy the present effects of past discrimination which have been demonstrated in the legislative findings adopted in s. 126.601. The Participation Goals established by this Part shall be used as guidelines and shall not be construed as a ceiling or floor to African-American and Women's Business Enterprise participation.

126.602 Applicability. This part shall apply to all contracts funded in whole or in part by City funds, regardless of the source or sources of other funds; provided that there shall be exempt from the requirements

of this part any contract with respect to which a requirement for African-American or Women's Business Enterprise participation is imposed by state or federal law or prohibited by state or federal law. The program established by this Part shall be known as the Equal Business Opportunity Program.

126.603 Definitions. As used in this Part the following terms shall have the following meanings:

(a) *African-American* means a person who has origins in the black racial groups of Africa, or considers and holds herself or himself out as a person having origins in the black racial groups of Africa.

(b) *African-American Business Enterprise* means a business which is

legitimately owned, operated and controlled by African-Americans, has suffered from the effects of past discrimination within the business community of the City of Jacksonville, and which has been certified as such under s. 126.606. Active participation in the business community of the City of Jacksonville creates a presumption that the applicant has suffered from the effects of past discrimination within such business community.

(c) *Black* has the meanings given to it by the United States Equal Employment Opportunity Commission in its rules defining and describing that term.

(d) *City* means the City of Jacksonville, and its participating user departments.

(e) *Chief* means the Chief of Procurement and Supplies.

(f) *Joint Venture Enterprise* means an association of two or more business enterprises acting as a contractor and performing or providing services on a contracting opportunity in which each joint venture partner combines property, capital, efforts, skills, and/or knowledge. The joint venture association should be limited in scope and duration.

(g) *Legitimately owned, operated and controlled* means ownership of at least fifty-one percent (51%) interest in the business enterprise. This ownership shall be real and continuing, and shall go beyond the pro forma ownership of the business enterprise reflected in the ownership

documents. The African-American or woman shall enjoy the customary incidents of ownership and shall share in the risks and profits commensurate with their ownership interest, as demonstrated by an examination of the substance, rather than the form of arrangements. The African-American or woman owner shall possess and exercise the legal power to direct the management and policies of the business and to make the day to day as well as major decisions on matters of management, policy and operations. If the owner of the business enterprise who is not an African-American or a woman is disproportionately responsible for the operation of the business enterprise, then the business enterprise is not controlled by an African-American or woman. The primary

consideration in determining legitimate ownership, operation and control of the business enterprise rests upon the nature of the industry which the business is engaged and is based upon control over management, interest in capital, interest in profit or loss and contributions to capital, equipment and expertise. For instance, in a required trade the license holder and qualifying agent shall be the African-American or woman applying for certification.

(h) *Participation Goals* means percentage objective for increasing participation of certified African American and Women's Business Enterprises for City contracting opportunities to a level comparable to their availability in the relevant market area and to remedy the

present effects of past discrimination.

(i) *User Department* means any of the departments of the City which participate in this chapter.

(j) *Women's Business Enterprise* means a business which is legitimately owned, operated and controlled by women, has suffered from the effects of past discrimination within the business community of the City of Jacksonville, and which has been certified as such under s. 126.606. Active participation in the business community of the City of Jacksonville creates a presumption that the applicant has suffered from the effects of past discrimination within such business community.

126.604. African-American and Women's Business Enterprise Participation Goals.

(a) The City hereby establishes the following African-American and Women's Business Enterprise participation policy goals with respect to the award of City contracts for ten (10) fiscal years commencing from the effective date of this ordinance:

(1) Participation Goals for capital improvements shall be eight percent (8%) African-American Business Enterprises, and five percent (5%) for Women's Business Enterprises.

(2) Participation Goals for contractual supplies shall be nine percent (9%) African-American Business Enterprises,

and nine percent (9%) for Women's Business Enterprises.

(3) Participation Goals for contractual services shall be nine percent (9%) African-American Business Enterprises, and nine percent (9%) for Women's Business Enterprises.

(4) Participation Goals for professional services shall be seven percent (7%) African-American Business Enterprises, and six percent (6%) for Women's Business Enterprises.

(b) The City hereby establishes the following African-American and Women's Business Enterprise Participation Goals with respect to the award of City contracts commencing from the effective date of this ordinance through and including City fiscal

year 1992-1993:

(1) Participation Goals for capital improvements shall be sixteen percent (16%) African-American Business Enterprises, and nine percent (9%) for Women's Business Enterprises.

(2) Participation Goals for contractual supplies shall be nine percent (9%) African-American Business Enterprises, and nine percent (9%) for Women's Business Enterprises.

(3) Participation Goals for contractual services shall be nine percent (9%) African-American Business Enterprises, and nine percent (9%) for Women's Business Enterprises.

(4) Participation Goals for professional services shall be seven percent

(7%) African-American Business Enterprises, and six percent (6%) for Women's Business Enterprises.

(c) These Participation Goals for African-American and Women's Business Enterprises in the different areas of contracting shall be separately met. The City shall make every effort to meet the established goals. The Participation Goals shall be used as guidelines and shall not be construed as a ceiling or floor to African-American and Women's Business Enterprise participation. Participation Goals shall be measured as a percentage of the total dollar value of a contract award. Accomplishment of the goals shall be calculated in the following manner:

(1) The dollar value of any and

all contracts awarded to African-American and Women's Business Enterprises excluding noncertified business enterprise subcontractors;

(2) The dollar value of any and all subcontracts awarded to African-American and Women's Business Enterprises; and

(3) The dollar value of any and all contract and subcontract awards attributable to African-American and Women's Business Enterprises in a joint venture enterprise.

(d) The Participation Goals shall be continually reviewed. The Chief shall recommend any adjustments, if necessary, to the City Council based upon consideration of the availability of certified African American and Women's Business Enterprises in

the relevant market area. There shall be a review by the City Council.

(e) All User Departments shall be responsible for meeting the Participation Goals, and through the Chief shall report to the City Council, pursuant to s. 126.613 as to the manner by which Participation Goals have been met.

Section 126.605. Alternative methods of achieving Participation Goals. After consideration of the availability of certified African American and Women's Business Enterprises in the relevant market area for each City contracting opportunity, the User Department, with the approval of the Chief, shall determine on a project by project basis the City's use of any of the following methods:

(1) The Participation Percentage Plan as set forth in subsection (a) herein.

(2) The Sheltered Market Plan as set forth in subsection (b) herein.

(3) The Direct Negotiation Plan as set forth in subsection (c) herein.

(4) The Bid Preference Plan as set forth in subsection (d) herein.

(a) Under the Participation Percentage Plan, the User Department, with the approval of the Chief, may set specific African American and/or Women's Business Enterprises participation percentages on a particular contracting opportunity. A contract shall be awarded to the lowest responsible bidder submitting a reasonable bid which meets the set participation percentages or to the lowest responsible bidder who has made a

good faith effort, as described in s. 126.612 to meet the set participation percentages. An African-American and Women's Business Enterprise bidder may meet the set participation percentages for the respective classifications by applying its dollar value excluding noncertified Business Enterprise subcontractors under the award.

(1) If a bidder is not able to meet the set African-American and Women's Business Enterprises participation percentages, then the bidder must demonstrate and document that a good faith effort, as described in s. 126.612, was made to meet the set participation percentages to be considered a responsive bidder.

(2) The Chief shall have the right to reject bids not meeting the set

African-American and Women's Business Enterprises participation percentages or which are submitted by bidders who fail to establish a good faith effort in the bid submission pursuant to s. 126.612.

(3) Prior to the advertising for bids or proposals, the User Department, may seek to modify or waive the established African-American and Women's Business Enterprises participation percentage on a bid-by-bid basis. The Chief shall make the determination to modify or waive the participation percentage on the basis of the following criteria:

(i) Any required goods, services or other contracting opportunity are available only from a sole or single source as stated in s. 126.212;

(ii) The User Department has certified in writing to the Chief that an emergency exists as stated in s. 126.201;

(iii)Available certified African-American and Women's Business Enterprises have given price quotations which are unreasonably high in that they exceed competitive levels which cannot be attributed to cover costs inflated by the effects of past discrimination.

(iv) The requirements of a particular contracting opportunity renders any subcontracting opportunities unfeasible.

(v) Compliance with the requirements of this Part would impose an unwarranted economic burden upon the City.

(vi) African-American and Women's Business Enterprises participation

is imposed by state or federal law or prohibited by state or federal law.

(vii) A User Department has attained its Participation Goals.

(viii) A User Department desires to use an alternative method of meeting Participation Goals; or

(ix) Certified African-American or Women's Business Enterprises are not available for a particular contracting opportunity.

(4) The Chief's determination to modify or waive the participation percentage shall be made in writing and shall be subject to review and approval by the Mayor's Budget Review Committee.

(b) Under the Sheltered Market Plan, the User Department, with the approval of

the Chief, may designate in the bid specifications its intent that certain City contracting opportunities be for the exclusive competition of certified African-American and Women's Business Enterprises consistent with the objectives of this Part. To promote effective competition, the Sheltered Market Plan may only be utilized where at least two (2) or more certified African-American or Women's Business Enterprises are available to perform the contract. The Sheltered Market Plan shall be used separately for certified African-American Business Enterprises or Women's Business Enterprises. Joint venture enterprises as described in s. 126.609, which include certified African-American or Women's Business Enterprises may participate

as certified African-American or Women's Business Enterprises under this section.

(c) Under the Direct Negotiation Plan, the User Department, with the approval of the Chief, may commence direct negotiations with certified African-American or Women's Business Enterprises in the award of professional services contracts, subject to the provisions of the Consultant's Competitive Negotiations Act. The Direct Negotiation Plan shall be utilized for professional services awards which are less than Fifty Thousand Dollars ($50,000). Joint venture enterprises, as described in s. 126.609, which include certified African-American or Women's Business Enterprises may participate as a certified African-American or Women's business Enterprise under this

section.

(d) Under the Bid Preference Plan, the User Department, with the approval of the Chief, may grant bid preferences of up to five percent (5%) and not more than Five Thousand Dollars ($5,000) to certified African-American and Women's Business Enterprises, if at the end of a fiscal year a Participation Goal has not been achieved. Use of the Bid Preference Plan shall be included in bid specifications. Once all bids are received under this Plan, the contract shall be awarded to the lowest responsible bidder or to the certified African-American or women's Business enterprise whose bid is within the percentage or dollar amount of the lowest responsible bid, as set out in the

specifications. Joint venture enterprises as described in s. 126.609\ which include certified African-American or Women's Business Enterprises, may participate as certified African-American or Women's Business Enterprises under this section.

(e) Notwithstanding the provisions of this Part or of any other ordinance to the contrary, the City retains and shall have the right to reject any and all bids or proposals, in whole or in part, for any reason, if such action is deemed to be in the best interest of the City. Additionally, the City reserves the right to waive any and all irregularities which do not provide an unfair advantage to bidders, and to solicit and evaluate exceptions to all bids and proposals submitted pursuant to

this Part.

126.606 Certification of African-American and Women's Business Enterprise. The following procedures shall apply in certifying African-American or Women's Business Enterprises, under this Part.

(a) The Chief shall institute a prequalification procedure to determine if an African-American or Women's Business Enterprise is qualified to bid and perform on City contracting opportunities under this Part.

(b) The Applicant must state in writing under oath that the applicant legitimately owns, operates and controls the business enterprise and that the applicant has suffered from the effects of past discrimination within the business community

of the City of Jacksonville and that the applicant is eligible pursuant to s. 126.610.

(c) The Chief shall make the determination as to the prequalification of African-American or Women's Business Enterprises being placed on the list of prequalified African-American or Women's Business Enterprises. This determination shall be based upon whether the business enterprise legitimately owned, operated and controlled by an African-American or a woman and has suffered from the effects of past discrimination within the business community of the City of Jacksonville and is eligible pursuant to s. 126.610. This determination should be made within a practicable period not to exceed 150 days.

(d) In the event the Chief determines that the applicant is not legitimately owned, operated and controlled by African-Americans or women, or has not suffered from the effects of past discrimination within the business community of the City of Jacksonville, or is not eligible pursuant to s. 126.610, a written denial notice and appeal form shall be sent to the last known mailing address provided by the applicant. The Chief shall indicate the reasons for noncertification and indicate that the applicant has fifteen (15) days from the date of the denial notice to appeal the decision. The applicant may appeal the decision concerning contracts for supplies, capital improvements and services other than professional services to the

Awards Committee. The applicant may appeal the decision concerning contracts for professional services to the Professional Services Evaluation Committee. The applicant shall have fifteen (15) days from the date of the denial notice to appeal the denial of certification to the Awards Committee or Professional Services Evaluation Committee. The applicant's appeal of the Chief's denial of certification shall be prepared on a form provided by the Chief and shall state specific reasons for reversing the decision of the Chief. The Awards Committee or Professional Services Evaluation Committee shall conduct a hearing to review the Chief's decision. The Chief shall have the authority to request the attendance of any

witnesses and production of any documents concerning the applicant's affairs. Failure to comply with these requests promptly may be grounds for denial of the appeal.

(e) If the status of a certified African-American and Women's Business Enterprise changes because of legitimate ownership, operation and control of the business enterprise, then it shall be the original applicant's responsibility to notify the Chief. Failure to report such changes within five (5) days of a change shall result in revocation of certification and other penalties specified in s. 126.614.

126.607. African-American and Women's Business Enterprise Subcontractors. The following procedures shall apply with respect to African-American or Women's

Business Enterprise subcontractors, subconsultants and suppliers:

(a) All bidders on City contracts must submit with their bids or proposals on forms provided by the Chief, the following:

(1) A list of the names of the certified African-American and Women's Business Enterprises to be utilized as subcontractors, subconsultants and suppliers;

(2) A letter or other written statement from each certified African-American and Women's Business Enterprise indicating an intent to perform as a subcontractor, subconsultant and supplier;

(3) A description of the work, materials, equipment or services to be

furnished by the certified African-American and Women's Business Enterprise subcontractor, subconsultant or supplier; and

(4) The agreed upon dollar value for such work, materials, equipment or services.

(b) A bidder or proposer receiving an award of a contract shall be responsible for maintaining the level of such certified African-American and Women's Business Enterprise participation designated on the bid submission for the duration of the contract.

(c) Any change of such designated participation after bid opening or receipt of proposals must be submitted to the Chief within five (5) days of the change. The

bidder, proposer or contractor must make a good faith effort, as described in s. 126.612, to replace the designated certified African-American and Women's Business Enterprise subcontractor with another certified African-American and Women's Business Enterprise. All substitutes for certified African-American and Women's Business Enterprise subcontractors require approval of the Chief.

(d) The bidder, proposer or contractor may appeal the Chief's determination in subsection (c) to the Mayor's Budget Review Committee. This appeal must be filed with the Chief within five (5) days from the date of the Chief's decision. The Mayor's Budget Review Committee shall conduct a hearing to review

the Chief's determination. The Chief shall have the authority to request attendance of any witnesses and production of any documents. The bidder's, proposer's or contractor's failure to comply with these requests promptly may be grounds for a denial of the appeal.

Section 126.608. Payment of Subcontractors. All contracts awarded with certified African-American and Women's Business Enterprise subcontractors shall require the prime contractor to pay all its certified African-American and Women's Business Enterprise subcontractors their pro-rata share of progress payments made by the City under the applicable contract. The pro-rata share shall be based on all work completed, materials and equipment furnished

or services performed by the certified African-American and Women's Business Enterprise subcontractors at the time of payment. The prime contractor shall obtain prior approval of the City for not making a payment to its certified African-American and Women's Business Enterprise subcontractors as required by thi provision. Failure to comply with the requirements of this section shall result in penalties as specified in s. 126.614.

126.609. African-American and Women's Business Enterprise Joint Ventures. The following procedures shall apply with respect to certified African-American and Women's Business Enterprise joint ventures:

(a) A joint venture shall be considered a certified African-American and

Women's Business Enterprise for purposes of the award of a contract when at least one joint venture partner is a certified African-American and Women's Business enterprise which has been properly certified pursuant s. 126.606. The certified African-American and Women's Business Enterprise joint venture partner shall be responsible for a clearly defined portion of the work to be performed, share in the ownership, control, management responsibilities, risks, and profits of the joint venture enterprise. The certified African-American and Women's Business Enterprise joint venture partner's portion of the contract must be assigned a commercially reasonable dollar value. The portion of the certified African-American and Women's Business Enterprise joint

venture partner's work, materials, equipment or services shall be set forth in detail from the work, materials, equipment or services to be furnished by the noncertified business enterprise joint venture partners. The certified African-American and Women's Business Enterprise joint venture partner business participation shall equal or exceed twenty-five percent (25%) of the total dollar value of the joint venture. The noncertified business enterprise joint venture partners shall set forth in detail the management, technical and entrepreneurial assistance and skills that they are providing the certified African-American or Women's Business Enterprise joint venture partner.

(b) A joint venture must submit

an application for approval prior to the bid opening or receipt of proposals for each project. The joint venture shall be certified by the same process as required for certification of African-American or Women's Business Enterprises as specified in s. 126.606. Joint venture certification shall be given only on a bid-by-bid basis.

(c) The Chief shall encourage certified African-American or Women's Business Enterprises and noncertified business enterprises to participate in joint venture opportunities. The Chief shall advertise and promote the benefits of the joint venture enterprise program. To achieve this objective, the Chief shall maintain lists of available certified African-American and Women's Business

Enterprises and noncertified business enterprises seeking to participate as joint ventures.

126.610. Graduation from Participation.

(a) A business which has been certified as an African-American or Women's Business Enterprise shall cease to be certified under s. 126.606 when its average annual gross receipts reach the following levels:

(1) For a general construction business in which average annual gross receipts for the preceding three (3) years from the time of its bid submission exceeds $3,000,000, per year.

(2) For a specialty construction business in which average

annual gross receipts for the preceding three (3) years from the time of its bid submission exceeds $1,000,000, per year.

(3) For a wholesale or retail business in which average annual gross receipts for the preceding three (3) years from the time of its bid submission exceeds $1,000,000, per year.

(4) For a service business other than professional services in which average annual gross receipts for the preceding three (3) years from the time of its bid submission exceeds $1,000,000, per year.

(5) For a professional service business in which average annual gross receipts for the preceding three (3) years from the time of its proposal

submission exceeds $2,000,000, per year.

(6) For a manufacturing business in which average annual gross receipts for the preceding three (3) years from the time of its bid submission exceeds $5,000,000, per year.

(b) This section shall only be applicable to business enterprises that have operated for the preceding three (3) years.

(c) It shall be the responsibility of the applicant for the African-American or Women's Business Enterprise certification to notify the Chief within five (5) days of its ineligibility, under this Part. A failure to provide such notification shall result in revocation of certification and the penalties specified in s. 126.614.

126.611. Review of certification. The following procedures shall apply to a periodic review of certification of African-American Business Enterprises, Women's Business Enterprises, and joint ventures:

(a) Upon the filing of an application for certification, the African-American Business Enterprises, Women's Business Enterprises and joint venture becomes subject to periodic interviews by the City, unannounced on site inspections of its facilities and projects by the City, and review of any documentation concerning its affairs as required by the City.

(b) Upon certification as an African-American Business Enterprise, Women's Business Enterprise and joint venture, the Chief may impose additional

requirements upon African-American Business Enterprises, Women's Business Enterprises and joint ventures including but not limited to mandatory attendance at conferences, seminars and other required technical assistance.

(c) Failure to comply with the requirements of this section shall result in revocation of certification and other penalties specified in s. 126.614.

126.612. Good Faith Efforts. Procedures for establishing good faith efforts to meet participation percentages as set forth in s. 126.605(a) shall be as follows:

(a) Any bidder submitting a bid or proposal which does not meet the set participation percentages must provide

documentation of its good faith efforts to meet the set participation percentages. Documentation of good faith efforts shall be submitted with the bid or proposal on forms provided by the Chief, in all bid and proposal documents, and shall include the following considerations:

(1) A written statement that the bidder or proposer attended all pre-bid conferences.

(2) Written notification sent by the bidder to a reasonable number of City certified African-American or Women's Business Enterprises that perform the type of work, materials, equipment or services sought to be subcontracted. This notification should solicit certified African-American or Women's Business

Enterprise participation and must be received by the certified African-American or Women's Business Enterprise seven (7) working days prior to the date of the bid opening or receipt of proposals in order to allow the certified African-American or Women's Business Enterprise to participate effectively.

(3) A written statement that subcontracting is not economically feasible for portions of work, materials, equipment or services to be furnished by certified African-American or Women's Business Enterprises including, where appropriate, segmenting elements of work, materials, equipment or services or combining elements into economically feasible units. The ability of the bidder to perform the work or

services with its own work force or supply materials or equipment from is own business will not excuse the bidder from making good faith efforts to meet the set participation percentages.

(4) A written statement of the bidder's efforts made to negotiate with certified African-American or Women's Business Enterprises, including:

(i) the names, addresses and telephone numbers of certified African-American or Women's Business Enterprises who were contacted;

(ii) the date negotiations took place;

(iii) a description of the information provided to certified African-American or Women's Business

Enterprises, regarding the plans, specifications and requirements for portions of the work or services to be performed or materials or equipment to be furnished.

(5) A written statement of the efforts made to assist certified African-American and Women's Business Enterprises contacted who need assistance in obtaining bonding, insurance, and financing.

(6) A written statement of the reasons for not accepting a certified African-American and Women's Business Enterprise on the project. Receipt of a lower quotation from a noncertified business enterprise will not excuse a bidder's failure to meet the set participation percentages.

(7) Documented outreach to

certified African-American and Women's Business Enterprises by utilizing local, state and federal business assistance offices.

(b) The Chief may waive or reduce the set participation percentages on a particular contracting opportunity when good faith efforts are demonstrated by the bidder. The Chief shall make the determination of whether a bidder has made good faith efforts. The bidder may appeal such determination concerning contracts for supplies, capital improvements and services to the Awards Committee. The proposer may appeal such determination concerning contracts for professional services to the Professional Services Evaluation Committee. This appeal must be filed with the Chief

within five (5) days from the date of the Chief 's decision. The respective Committee shall conduct a hearing to review the Chief's determination. The Chief shall have the authority to request attendance of any witnesses and production of any documents. The bidder's, proposer's or contractor's failure to comply with these requests promptly may be grounds for a denial of the appeal.

126.613. Monitoring. The Chief shall establish an Equal Business Opportunity Office to properly administer this Part. The Equal Business Opportunity Office, with assistance from user agencies, shall be responsible for coordinating the program, outreach and for providing technical assistance to the certified African-American

and Women's Business Enterprise. The Chief shall continually monitor the progress toward achievement of the Participation Goals established by this Part. The Chief shall report on a quarterly basis to the Mayor and the City Council, on the administration and operation of this Part specifically with reference to the breakdown of African-American and Women's Business Enterprise participation by each User Department, type of contract, number of contracts, dollar amount of contracts, and the manner in which participation was achieved. At the end of the fiscal year, if the User Department has not met the Participation Goals as set out in s. 126.604, then commencing with the next fiscal year, approval of further contracts

by the User Department must be obtained from the City Council.

126.614. Penalties.

(a) A bidder, proposer, contractor, joint venturer or applicant that has willfully failed to comply with any provision of this Part shall be liable for any or all or any combination of the following penalties:

(1) Ineligibility of a bid or proposal on the particular contracting opportunity;

(2) Withholding all payments under the particular contract from the contractor until it is determined that the contractor is in compliance;

(3) Termination of the contract;

(4) Exclusion from a contract award for any future City contracting opportunity until such time as the contractor demonstrates to the Chief that it will comply with the provisions of this Part; and/or

(5) If the contractor is certified as an African-American Business Enterprise, Women's Business Enterprise or joint venture, revocation of the certification as an African-American Business Enterprise, Women's Business Enterprise or joint venture;

(b) In addition to the penalties stated above, any bidder, proposer, contractor, joint venturer or applicant for African-American and Women's Business Enterprises certification who willfully

violates this Part, including, but not limited to making a misstatement in the bidding process concerning its status as an African-American and Women's Business Enterprise for the purpose of obtaining a contract, shall be guilty of a Class D offense and shall be liable for a civil penalty in an amount not to exceed Ten Thousand Dollars ($10,000). Such civil penalties shall be collected in an appropriate judicial proceeding in a court of competent jurisdiction.

126.615. Other Provisions of Purchasing Code to Apply. Except as provided in this Part to implement the Equal Business Opportunity Program, the provisions of Parts 1, 2, 3 and 4, Chapter 126, apply. The Chief shall establish rules which

specify the manner in which conflicts between the provisions of Parts 1, 2, 3 or 4 and this Chapter are to be resolved.

126.616. Policies and Procedures for Implementation of Equal Business Opportunity Program. The Chief and the Equal Business Opportunity Office shall prepare for approval by the Mayor policies and procedures regarding implementation and application of the Equal Business Opportunity Program. These policies and procedures shall be applied in their entirety by the Chief and the Equal Business Opportunity Office in the implementation and administration of the Equal Business Opportunity Program.

126.617. Length of Participation, Repeal, Saving Clause. The Equal Business

Opportunity Program created by this Part shall remain in effect for ten (10) years. Thereafter, this Part and the Equal Business Opportunity Program established hereby shall terminate and shall be repealed and of no further force and effect, unless prior to that date action is taken to extend this Part.

Section 2. Severability. If any part, section, paragraph, sentence, clause, phrase or word of this ordinance is for any reason held or declared to be unconstitutional, November 12, 1992 inoperative, invalid or void, such holding shall not affect the remaining portion of this ordinance; and it shall be construed to have been the legislative intent to pass this ordinance without such unconstitutional, invalid, void

or inoperative portion or portions therein; and the remainder of this ordinance, after exclusion of such unconstitutional, invalid or inoperative portion or portions, shall be deemed and held to be valid as if such unconstitutional, invalid, void or inoperative portion or portions had not been included therein.

Section 3. Effective Date. This ordinance shall become effective upon signature by the Mayor or upon becoming effective without the Mayor's signature.

Form Approved:

Assistant General Counsel
lsm:mlr:10/23/92

ORDINANCE 92-1269-113

CERTIFICATE OF AUTHENTICATION

ENACTED BY THE COUNCIL

October 27, 1992

WARREN A. JONES
COUNCIL PRESIDENT

ATTEST:

BEVERLY S. DOMEN
SECRETARY TO THE COUNCIL

APPROVED
October 28, 1992

ED AUSTIN, MAYOR

Council Members Reagan, Carlucci, Crescimbeni, Davis, Brown, Leggett, Jones and Wood offer the following substitute to File #92-1464:

ORDINANCE 92-1464-1133

AN ORDINANCE CONCERNING MINORITY BUSINESS ENTERPRISE; AMENDING PART 6 OF CHAPTER 126, ORDINANCE CODE; CREATING A NEW SECTION 126.618, ORDINANCE CODE; PERMITTING THE CITY TO USE THE IMPACT PLAN; CREATING A NEW SECTION 126.619, ORDINANCE CODE, CONCERNING TECHNICAL ASSISTANCE; CREATING A NEW SECTION 126.620, ORDINANCE CODE, ESTABLISHING AN EQUAL BUSINESS OPPORTUNITY ADVISORY COMMITTEE; CREATING A

NEW SECTION 126.621, ORDINANCE CODE, DEFINING DUTIES OF ADVISORY COMMITTEE; CREATING A NEW SECTION 126.622, ORDINANCE CODE, CONCERNING INVALIDITY OF VARIOUS PROVISIONS; PROVIDING AN EFFECTIVE DATE.

BE IT ORDAINED by the Council of the City of Jacksonville:

Section 1. A new Section 126.618, Ordinance Code, is hereby created to read as follows:

126.618. Impact Plan. In addition, to the plans set forth in s. 126.605, the User Department, with the approval of the Chief, may use the Impact Plan in order to meet the Participation Goals set forth in s. 126.604.

In order to develop a record as to how this Part meets the Participation Goals, the City shall use s. 126.605. The Mayor shall report to the Council in accordance with s.126.613. In the event the Impact Plan is declared invalid or unenforceable, the remainder of this Part shall remain in full force and effect.

(1) Under the Impact Plan, in the areas of capital improvements, supplies and contractual services, the Impact Plan shall operate in the same manner as an evaluated bid using an Impact Proposal which shall be evaluated by a matrix which assigns weighted point values for the following impact criteria:

(A) Participation of Certified African-American or Women's Business

Enterprises as proposers or bidders on City projects; Participation of Joint ventures with certified African-American or Women's Business Enterprises as proposers or bidders on City projects;

(B) Use of certified African-American or Women's Business Enterprise subcontractors, or subconsultants;

(C) Use of certified African-American or Women's Business Enterprise suppliers;

(D) Use of African-American or Women employees and/or affirmative action programs for African-American and Women employees;

(E) Use of apprenticeship and training programs for African-Americans or Women employees;

(F) Use of technical assistance, business related opportunities and economic assistance programs for certified African-American and Women's Business Enterprises;

(G) Impact on economically disadvantaged target areas; and/or

(H) Any other factors which contribute to a positive impact on African-American or Women Business Enterprises or employees.

(2) Except for professional services, after a bidder's Impact Proposal is evaluated, the total score derived from the Impact Proposal shall be divided into the sealed bid price to obtain a value cost for each bid. The bid price of all bidders shall remain in their individual sealed envelopes until such time as the above

criteria have been evaluated, for all such bidders.

(3) Under the Impact Plan, in the area of professional services, the score from a proposer's Impact Proposal shall be evaluated using the above specified impact criteria and that total score for each proposal shall be added to the score of the proposers from the ten professional service evaluation criteria matrix, as provided in s. 126.302 and the combination of the two shall constitute the basis for ranking the numerical order of those best qualified proposers.

(4) In the event the Impact Plan is not achieving the Participation Goals, then the Chief may adjust the relative weighted point values for each of the impact

criteria.

(5) (A) Evaluations for the Impact Plan created by this Part shall be performed by a committee composed of a representative or designee from each of the following: The Department of Administration and Finance, the Economic Development Division and the Equal Employment Opportunity Coordinator. The representative from the Department of Administration and Finance shall chair the committee. The committee shall evaluate all bids or proposals using the above specified criteria and shall, in the case of bids, determine and recommend to the Awards Committee the lowest and best responsive and responsible evaluated bid. In the case of professional services, the evaluation shall be forwarded to the Professional Services

Evaluation Committee for factoring into the selection process.

(B) All meetings of the the committee shall be governed by Section 286.011, Florida Statutes, and the committee shall keep official written minutes of its meetings, which shall be maintained on file in the Office of the Equal Employment Opportunity Coordinator, as permanent public records.

(C) The committee shall cause written notice of the date, time, place and purpose of its meetings to be posted at least twenty-four hours in advance of such meetings. A true and correct copy of such notice shall be retained on file, in the Office of the Equal Employment Opportunity Coordinator, as a permanent public record.

(6) Under the Impact Plan, the Chief shall have the right to reject any and all bids or proposals in which the total price exceeds fifteen percent (15%) of the total price of the lowest responsive, responsible bid or proposal.

Section 2. A new Section 126.619, Ordinance Code, is hereby created to read as follows:

126.619. Technical assistance.

(a) The Equal Business Opportunity Office, with assistance from the User Departments, shall be responsible for coordinating the Program outreach and any technical assistance offered to certified African-American and Women's Business Enterprises.

(b) In providing for technical

assistance, the Equal Business Opportunity Office may utilize and make available to certified African-American and Women's Business Enterprises, services from various organizations which promote economic development, such as: University of North Florida Small Business Development Center, Florida Community College at Jacksonville's Urban Resource Center, Edward Waters College, Jacksonville Economic Development Corporation, First Coast Black Business Investment Corporation, Jacksonville Minority Business Development Center, Private Industry Council. Use of the above specified organizations is given as an example and not as an intent to contract with any such organization.

Section 3. A new Section 126.620,

Ordinance Code is hereby created to read as follows:

126.620. Establishment of Equal Business Opportunity Advisory Committee. There is hereby established an Equal Business Opportunity Advisory Committee. The Advisory Committee shall be composed of five (5) private citizens. Members of the Advisory Committee shall be appointed by the Mayor with the approval from the City Council and shall serve two (2) year terms with no compensation. No member of the Advisory Committee shall either individually, or as a partner in a partnership, or shareholder or officer in a corporate entity conduct any business with the City of Jacksonville and its independent agencies. The restriction on shareholders

shall not apply to shareholders of shares traded on any national stock exchange. The members of the Advisory Committee shall elect a member of the Advisory Committee to serve as chairperson for a term of one (1) year with new elections on an annual basis. No member shall serve as chairperson for two (2) consecutive terms. All meetings of the Advisory Committee shall be public meetings governed by Section 286.011, Florida Statutes. Written minutes of all meetings shall be kept as an official public record in the Office of the Coordinator. The Advisory Committee shall meet at least monthly.

Section 4. A new Section 126.621, Ordinance Code is hereby created to read as follows:

126.621. Duties of the Equal Business Opportunity Advisory Committee. The Equal Business Opportunity Advisory Committee shall review the implementation of the Equal Business Opportunity program and make recommendations to the Mayor and City Council for achieving the objectives of this Part.

Section 5. A new Section 126.622, Ordinance Code is hereby created to read as follows:

126.622 Invalidity. In the event that a court of competent jurisdiction declares s. 126.605 and s. 126.618, in their entirety, to be unconstitutional, invalid or otherwise unenforceable, or enjoins the use of s. 126.605 and s. 126.618, in their entirety, then the City Council must

thereafter approve all contracts except those issued pursuant to s.126.203.

Section 6. Effective Date. This ordinance shall become effective upon signature by the Mayor or upon becoming effective without the Mayor's signature; provided however, this ordinance shall not become effective unless City Council File #92-1269 becomes effective.

Form Approved:

_____
Assistant General Counsel
10/27/92 reagan4.mbe - rmp

ORDINANCE 92-1464-1133

CERTIFICATE OF AUTHENTICATION

ENACTED BY THE COUNCIL

October 27, 1992

WARREN A. JONES
COUNCIL PRESIDENT

ATTEST:

BEVERLY S. DOMEN
SECRETARY TO THE COUNCIL

APPROVED

ED AUSTIN, MAYOR

Supreme Court, U.S.
FILED
NOV 19 1992

No. 91-1721

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

NORTHEASTERN FLORIDA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA,
Petitioner,

vs.

CITY OF JACKSONVILLE, FLORIDA, *et al.*
Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Eleventh Circuit

BRIEF OF EQUAL RIGHTS ADVOCATES, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA, AND THE EMPLOYMENT LAW CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
Interest of *Amici*	1
Summary of Argument	3
Argument	4
I	
Article III Standing is Demonstrated by the Particularized Injury Claimed By Petitioner	4
II	
These Alleged Victims of Unequal Treatment Have Standing to Challenge That Treatment	7
Conclusion	9

TABLE OF AUTHORITIES

Cases

	Page
Asarco v. Kadish, 490 U.S. 605 (1989)	5
Associated General Contractors Inc. v. City and County of San Francisco, 813 F.2d 922 (9th Cir. 1987)	2
Associated General Contractors, Inc. v. Coalition for Economic Equity, 950 F.2d 1401 (9th Cir. 1991)	2
Baker v. Carr, 369 U.S. 186 (1962)	5
CC Distributors, Inc. v. United States, 883 F.2d 146 (D.C. Cir. 1989)	8
City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989)	2, 6, 7-8
Cone Corp. v. Florida Dept. of Transportation, 921 F.2d 1190 (11th Cir.), *cert. denied*, 111 S.Ct. 2238 (1991)	9
Contractors Ass'n. of Eastern Pennsylvania, Inc. v. City of Philadelphia, 945 F.2d 1260 (3rd Cir. 1991)	8
DeFunis v. Odegaard, 416 U.S. 312 (1974)	8
Fullilove v. Klutznick, 448 U.S. 448 (1980)	2
Glacier Park Foundation v. Watt, 663 F.2d 882 (9th Cir. 1981)	8
Heckler v. Mathews, 465 U.S. 728 (1984)	7
Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977)	4-5
International Bro. of Teamsters v. United States, 431 U.S. 324 (1977)	8
Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616 (1987)	2
Lujan v. Defenders of Wildlife, 112 S.Ct. 2130 (1992)	5
Lujan v. National Wildlife Federation, 110 S.Ct. 3177 (1990)	7
Massachusetts v. Mellon (Frothingham), 262 U.S. 447 (1923)	6
National Ass'n. of Neighborhood Health Centers, Inc. v. Mathews, 551 F.2d 321 (D.C. Cir. 1976)	8

	Page
Northeastern Florida Chapter of Associated General Contractors v. Jacksonville, 951 F.2d 1217 (11th Cir.), *cert. granted*, 61 U.S.L.W. 3256 (1992)	4-5
Orange Park Florida T.V., Inc. v. F.C.C., 811 F.2d 664 (D.C. Cir. 1987)	8
Orr v. Orr, 440 U.S. 268 (1979)	7, 9
Regents of University of California v. Bakke, 438 U.S. 265 (1978)	7, 8, 9
Village of Arlington Heights Development Corp. v. Metropolitan Housing Corp., 429 U.S. 252 (1977)	7, 9
Wygant v. Jackson Board of Education, 476 U.S. 267 (1986)	2

Other Authorities

Antonin Scalia, "The Doctrine of Standing As An Essential Element of the Separation of Powers," 17 *Suffolk U. L. Rev.* 881 (1983)	5

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On Writ of Certiorari to the United States Court of Appeals For the Eleventh Circuit

BRIEF OF EQUAL RIGHTS ADVOCATES, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA, AND THE EMPLOYMENT LAW CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Interest of *Amici*

Amici, the Employment Law Center of the Legal Aid Society of San Francisco, Equal Rights Advocates, Lawyers' Committee for Civil Rights of the San Francisco Bay Area, and the Mexican American Legal Defense and Educational Fund ("MALDEF") are public interest law firms founded to secure and protect the civil and constitutional rights of minorities, women and low income persons. *Amici* believe that business opportunities for minority and women owned businesses are essential to the eco-

nomic development of our communities and that these opportunities should be promoted through the development by state and local governments of constitutionally valid minority and women owned business programs.

Amici are counsel for the Coalition for Economic Equity, a coalition of minority and women owned business associations and companies in San Francisco. *Amici* represented the Coalition as defendant intervenors in the cases brought by the Associated General Contractors of California challenging San Francisco's minority business enterprise program. *Associated General Contractors Inc. v. City and County of San Francisco*, 813 F.2d 922 (9th Cir. 1987) and *Associated General Contractors, Inc. v. Coalition for Economic Equity*, 950 F.2d 1401 (9th Cir. 1991). In addition, these *amici* served as counsel for the Coalition as *amicus* before this Court in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

Amici have also submitted *amicus* briefs to this Court in challenges to minority business enterprise programs and other cases involving race and gender conscious relief, including *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987); and *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986).

The Employment Law Center, the principal project of the Legal Aid Society of San Francisco, is nationally recognized for its expertise concerning issues surrounding employment. It has been a pioneer in the employment law field for over a decade. It focuses on the legal problems of disadvantaged people as they seek to secure, retain, and provide employment opportunities, and it represents those who find these opportunities denied them for reasons other than their ability to do the job.

For eighteen years, Equal Rights Advocates has been dedicated to working to secure the rights of women through the legal system. Representing the interests of women in lawsuits which have a significant impact on large numbers of women, combined with its public education program, the organization is recognized as having the expertise to advocate effectively for the rights of women who would otherwise not be represented.

The Lawyers' Committee for Civil Rights of the San Francisco Bay Area is the northern California affiliate of the Lawyers' Committee for Civil Rights Under Law. For the past twenty-five years, the Lawyers' Committee has been working to eliminate the effects of employment discrimination in the northern California area through litigation, legislation, and advocacy.

The Mexican American Legal Defense and Educational Fund, Inc. ("MALDEF") is a national non-profit civil rights organization established in 1967. Its principal objective is to secure the civil rights of Hispanics living in the United States through litigation and education.

In the three years since *Croson* was decided, *amici* have provided legal guidance to several state and local governments and minority and women owned business associations across the country regarding the adoption of constitutional minority and women owned business programs. Because of their support for constitutionally valid programs, *amici* are opposed to Petitioner's effort to dismantle the minority business enterprise participation program in Jacksonville. But *amici* have an interest in ensuring that all businesses which are denied an opportunity to compete be entitled to their day in court, including the minority and women owned business enterprises represented by *amici*. As organizations concerned with securing full equality in employment and contracting opportunities, *amici* have a strong interest in this case, and therefore respectfully submit this brief.

The written consents of the parties to the submission of this brief have been lodged with the Clerk pursuant to Rule 37.2.

Summary of Argument

A fair reading of the Complaint filed below reveals that a group of white contractors in the City of Jacksonville were overtly discriminated against on the basis of their race, and the Court of Appeals ruled that they had no standing to sue.

This remarkable result follows because the white contractors of the AGC did not point to a "specific" city contract they would have secured but for the minority business enterprise participation

program. But the white contractors did not sue for money lost as a result of losing any specific contracts; they sued for declaratory relief, to enjoin the operation of the ordinance and thus secure the opportunity to compete on an equal footing with minorities for all contracts let by the City.

Under the Eleventh Circuit's opinion, one may not challenge the denial of the opportunity to compete on an equal footing. In the Eleventh Circuit, governmental obstacles created on the basis of race or gender seemingly are immune, as long as they do not literally take away a benefit such as a municipal contract, but only bar one from applying for it.

The judgement below should be reversed because it is inconsistent with standing law developed by this Court which expressly recognizes that one may sue for the denial of an equal opportunity to compete for a benefit. The Eleventh Circuit's rule is wrong because it equates the requirement of "specific injury" in classic standing caselaw with a specifically identified economic injury. But that is not what "specific" means in the standing context. "Specific" injury includes a specific *handicap* illegitimately imposed; AGC alleged that specific, personal injury.

This Court's recent opinions emphasizing the constitutional separation of powers rationale behind standing requirements support reversal of the judgment below.

Argument

I

ARTICLE III STANDING IS DEMONSTRATED BY THE PARTICULARIZED INJURY CLAIMED BY PETITIONER

Only one of the three classic elements of standing is before this Court. The court below addressed only the "injury in fact" requirement, holding that AGC had failed to show a specific injury to itself.[1] *Northeastern Florida Chapter of Associated*

[1]The Court of Appeals properly assumed that the association, the AGC, would have standing if any member did. *Hunt v. Washington*

General Contractors v. Jacksonville, 951 F.2d 1217, 1219-20 (11th Cir.), *cert. granted*, 61 U.S.L.W. 3256 (1992). Not at issue here are the two other elements, relating to the causal connection between the injury and the conduct complained of, and whether it is likely that a favorable decision would redress the injury. *See generally*, *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, 2136 (1992).

The requirement of a specific injury is a function of the nature of judicial review: The Constitution's Article III cases or controversies requirement ensures, among other things, that courts will not interfere with other branches of government unless an individual asserts that he has been directly wronged. The point is to test whether "the plaintiff's alleged injury [is] a particularized one, which sets him apart from the citizenry at large." Antonin Scalia, "The Doctrine of Standing As An Essential Element of the Separation of Powers," 17 *Suffolk U. L. Rev.* 881, 881-82 (1983).

The constitutional contrast is between (i) a specific injury that sets a plaintiff apart from the general population, and (ii) an abstract injury to general rights suffered, if at all, by every citizen. *Lujan*, 112 S.Ct. at 2143. The term "specific" in this context is defined in juxtaposition with the "general" vindication of the public interest, *id.* at 2145; the same contrast is meant by the juxtaposition of "abstract" harm and the "concrete injury" alleged by a plaintiff with standing. *Id.* at 2146 (Kennedy, J., with Souter, J., concurring). The "specific" injury test is no more and no less than the requirement that plaintiffs have a "personal stake in the outcome" as opposed to a stake shared with the rest of the population. *Baker v. Carr*, 369 U.S. 186, 204 (1962), *quoted at Lujan*, 112 S.Ct. at 2148 (Stevens, J., concurring in the judgement). *See Asarco v. Kadish*, 490 U.S. 605, 635-636 (1989) (Rehnquist, C.J., concurring and dissenting) (no Article III standing for "generalized grievance" about governmental action).

But the test used by the Court of Appeals was not designed to, and does not, distinguish between would-be plaintiffs in this way.

State Apple Advertising Commission, 432 U.S. 333, 343 (1977). The standing issue in this case devolves to the standing of the AGC's white contractors barred from bidding on certain municipal contracts.

It bears no relation to the Article III interests discussed by this Court. The "specific contract" test of the Eleventh Circuit does not eliminate the plaintiff that pleaded "merely that he suffers in some indefinite way in common with people generally." *Massachusetts v. Mellon (Frothingham)*, 262 U.S. 447, 488 (1923). Crucially, the AGC pleaded injury, specific to it and its members, and *not* shared generally with any other group nor the population at large. Plaintiff is not composed of whites generally, or even white business owners generally; rather, the AGC includes contractors who "regularly bid on and perform construction work for the City of Jacksonville . . . [who would have been] eligible to, and would have bid on [the set aside contracts] but for the restrictions imposed on such contracts by the Defendants." Complaint ¶¶ 9, 46. These members of the AGC specifically alleged that they had been precluded from bidding on those set aside contracts. *Id.* ¶ 49.

These members of the AGC do not seek to vindicate a generalized right, nor the various rights of the general public. They make no generalized grievance. Unlike the rest of the population, the AGC members were eligible to bid on the set aside contracts themselves, and would have done so; but for the assertedly illegal action of the City. This is specific enough for Article III.

Minority set aside programs — like racial or gender based discrimination in general — are not the sort of executive or legislative action that this Court insulates from judicial review. *See e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (announcing guidelines for race conscious business set aside programs).[2] In the context of Article III's enforcement of

[2] Nor are related principles of federalism implicated by federal judicial review. This Court expressly made that point in disposing of one of appellants' arguments in the *Croson* case: "The mere recitation of a benign or compensatory purpose for the use of a racial classification would essentially entitle the States to exercise the full power of Congress under § 5 of the Fourteenth Amendment and insulate any racial classification from judicial scrutiny under § 1. We believe that such a result would be contrary to the intentions of the Framers of the Fourteenth Amendment, who desired to place clear limits on the States' use of race as a criterion for legislative action, and to have *the federal courts enforce those limitations*." *Croson*, 488 U.S. at 490 (emphasis supplied).

the separation of powers, it is important to note that judicial review here will not interfere in areas reserved to administrative or legislative discretion. *Compare Lujan v. National Wildlife Federation*, 110 S.Ct. 3177, 3191 (1990). There is nothing inappropriate in resolving, through the courts, the validity of the race conscious system of public contracting described in the complaint filed below.

II

THESE ALLEGED VICTIMS OF UNEQUAL TREATMENT HAVE STANDING TO CHALLENGE THAT TREATMENT

Below, the AGC alerted the Court of Appeals to the line of cases including *Village of Arlington Heights Development Corp. v. Metropolitan Housing Corp.*, 429 U.S. 252, 261-62 (1977); *Regents of University of California v. Bakke*, 438 U.S. 265 (1978); *Orr v. Orr*, 440 U.S. 268, 273 (1979), through to *Heckler v. Mathews*, 465 U.S. 728, 739 (1984), all of which noted that "discrimination *itself*," the imposition of unequal treatment alone, is an injury upon which the victim can sue. *Heckler*, 465 U.S. at 739 (emphasis supplied).

Under the teachings of this Court, no one is more directly affected, has more at stake, or is most accurately termed "an object of the action (or foregone action) at issue," *Lujan*, 112 S.Ct. at 2137, than the person who is treated differently by reason of his race or ethnicity. It is not possible to read the opinions in this Court's chief case in the substantive area of discrimination law without understanding that the victims of racially unequal treatment, as such, have suffered injury to their "*personal* rights." *Croson*, 488 U.S. at 492-493 (O'Connor, Rehnquist, White & Kennedy, JJ.) (emphasis supplied). Justice Stevens expressed his opinion that in public contracting, race ought generally to have no relevance to one's "*access* to the market," 488 U.S. at 512 (Stevens, J., concurring), and Justice Scalia quoted Justice

Douglas' *DeFunis* dissent: "Whatever his race, he had a constitutional right to have his application *considered* on its individual merits in a racially neutral manner." 488 U.S. at 527 (Scalia, J., concurring) (emphasis supplied), *quoting DeFunis v. Odegaard*, 416 U.S. 312, 337 (1974) (Douglas, J., dissenting).

The inability to compete, obstacles in securing access to markets, and double standards have always been treated by the Court as real, specific injuries, and persons on whom those inequalities are imposed have been granted standing. Neither the existence of the alleged injury, nor the specific identity of the victim, is eviscerated when the scheme under attack makes it difficult or impossible to specify an ultimate benefit lost. This has been true in the race discrimination context, such as in *Bakke* and *International Bro. of Teamsters v. United States*, 431 U.S. 324 (1977) (Title VII litigation):

> When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application.

431 U.S. at 365-366. This has been true in other areas of the law as well.[3] These cases all recognize that valid particularized complaints may be presented by those who, regardless of whether they

[3] Courts routinely grant standing to those who allege unequal opportunity to compete. *See e.g., CC Distributors, Inc. v. United States*, 883 F.2d 146, 149-150 (D.C. Cir. 1989) (loss of opportunity to compete for Air Force engineering supply contracts); *Glacier Park Foundation v. Watt*, 663 F.2d 882, 885 (9th Cir. 1981) (loss of opportunity to compete for national park concessions contract); *Contractors Ass'n. of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 945 F.2d 1260, 1264 (3rd Cir. 1991) (contractors' loss of opportunity to compete for city construction contracts); *Orange Park Florida T.V., Inc. v. F.C.C.*, 811 F.2d 664, 672 (D.C. Cir. 1987) (television station operator had standing to use for loss of opportunity to reapply for FCC license, despite not actually having reapplied). *See also, National Ass'n. of Neighborhood Health Centers, Inc. v. Mathews*, 551 F.2d 321 (D.C. Cir. 1976) (standing for health care provider which had been told it could not apply for funding).

would or would not assuredly secure an ultimate benefit, cry foul at the process which awards the benefit to another.

Despite the import of opinions such as *Bakke, Village of Arlington Heights* and *Orr*, all of which were cited to the court below, the Court of Appeals never mentioned them. Instead of following this Court's guidance, the Court of Appeals looked to its own precedent, *Cone Corp. v. Florida Dept. of Transportation*, 921 F.2d 1190 (11th Cir.), *cert. denied*, 111 S.Ct. 2238 (1991). But *Cone* too elides the teachings of this Court: *Cone* never considered the proposition that an unfair handicap, or having one's "access" to bids barred, might itself be an "injury." And beyond *Cone*, nothing else supports the ruling below.

Conclusion

The test for standing imposed by the Court of Appeals abides outside traditional standing law, adrift from the rationale of Article III, and discredited by the precedent of this Court. The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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November 19, 1992

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No. 91-1721

IN THE
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OCTOBER TERM, 1991

NORTHEASTERN FLORIDA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA,

Petitioner,

v.

CITY OF JACKSONVILLE FLORIDA and ED AUSTIN, in his official capacity as Mayor of the City of Jacksonville,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. AS AMICUS CURIAE SUPPORTING APPELLEE

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November 19, 1992

QUESTION PRESENTED FOR REVIEW

Whether an association challenging a racially exclusive government ordinance may establish standing by showing that its members are precluded from bidding on certain municipal contracts, or whether the association must show that its members actually would have received one or more of those contracts absent the set-aside provisions?

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICUS 1

STATEMENT 3

SUMMARY OF ARGUMENT 4

ARGUMENT

I Petitioner's Members Suffered an Injury-In-Fact Sufficient to Confer Standing, When They Suffered Exclusion From The Opportunity To Compete For City Contracts. 4

II Favorable Inferences Drawn from Petitioner's Allegations Establish Financial Harm to The Petitioner's Members. 9

III Petitioner Has Met Its Burden of Proof 10

CONCLUSION 13

TABLE OF AUTHORITIES

Cases — Page

Allen v. Wright, 468 U.S. 737 (1984) 6

Babbitt v. Farm Workers, 442 U.S. 289 (1979) 7

Capeletti Brothers, Inc., et. al. v. Broward County, 738 F.Supp. 1415 (S.D. Fla. 1990), *aff'd*, 931 F.2d 903 (11th Cir.), cert. denied, ___ U.S. ___, 111 S.Ct. 2871, 115 L.Ed.2d 1037 (1991). . . 5

City of Richmond v. J.A. Croson Company, 488 U.S. 469 (1989). 8

Cone v. Fla. Dept. of Transportation, 921 F.2d 1190 (11th Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2238 (1991). 5, 6, 8

Coral Constr. Co. v. King County, 941 F.2d 910, 930 (9th Cir.), *cert. denied*, ___ U.S. ___ 112 S.Ct. 875 (1992). 6

Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1979). *11*

Hunter v. Erickson, 393 U.S. 385 (1969) 8

International Brotherhood of Teamsters v. United States, *431 U.S. 324 (1977)*. *8*

Lucas v. South Carolina Coastal Council, ___ U.S. ___, 60 U.S.L.W. 4842, 1992 Westlaw 142517(1992). 12

Lujan v. Defenders of Wildlife, ____ U.S. ___, 112 S.Ct. 2130 (1992) 12

Northeastern Florida Chapter v. City of Jacksonville, 951 F.2d 1217 (11th Cir. 1992) 4, 5, 9

Pennell v. City of San Jose, 485 U.S. 1 (1988). . 6, 10

Regents of the University of California v. Bakke, 438 U.S. 265 (1978) 8

Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, (1976) 10

Warth v. Seldin, 422 U.S. 490, 501 (1975). . 6, 7, 10

Wygant v. Bd. of Education, 476 U.S. 267 (1986) . . 8

Constitution of the United States

Article III 7, 10

Ordinances

City of Jacksonville Purchasing Code, §126.603 . . . 10

No. 91-1721

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OCTOBER TERM, 1991

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Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. AS AMICUS CURIAE SUPPORTING APPELLEE

The Associated General Contractors of America, Inc., with the written consent of the parties, respectfully submits this brief as Amicus Curiae in support of the petitioner. The letters of consent have been filed separately herewith.

INTEREST OF THE AMICUS

The Associated General Contractors of America, Inc. ("AGC") is a private, non-profit trade association founded in 1918 to represent the national interests of general construction contractors. Approximately 8,000 of the leading firms engaged in general contracting are among the association's approximately 33,000 members. Among other things, these firms construct highways, bridges, buildings, industrial facilities, and municipal utilities.

AGC has 100 state and local chapters throughout the United States, with at least one chapter serving each state, and one chapter in Puerto Rico. The Petitioner is one of five AGC chapters in the State of Florida, and one of seven AGC chapters within the jurisdiction of the U.S. Court of Appeals for the Eleventh Circuit.

AGC members have a great and interest in government contracting policies and procedures. When necessary, AGC and its chapters turn to the courts for assistance with related issues. Other AGC chapters have brought cases similar to this one, including *Michigan Roadbuilders Ass'n, Inc. v. Milliken*, 834 F.2d 583 (6th Cir. 1987), *aff'd*, 109 S.Ct. 1333 (1989) and *Associated General Contractors of California, Inc. v. City and County of San Francisco*, 813 F.2d 922 (9th Cir. 1987). AGC has most recently participated in this Court's proceedings as amicus curiae in *Building and Construction Trades Council of the Metropolitan District v. Associated Builders and Contractors of Massachusetts/Rhode Island*, Nos. 91-261 and 91-274.

AGC's longstanding policy is to provide support for open competitive bidding for public construction contracts. The purposes of competitive bidding and AGC's related policy, are "to give all persons equal rights to compete for Government contracts; to prevent unjust favoritism, or collusion or fraud in the letting of contracts for the purchase of supplies; and thus to secure for the Government the benefits which arise from competition." *United States v. Brookridge Farm*, 111 F.2d 461, 463 (10th Cir. 1940).

AGC is concerned that the Eleventh Circuit's narrow rule, that a contractor must lose a specific contract before he or she can invoke the federal courts' jurisdiction over racially exclusionary criteria would encourage the excessive resort to such criteria. This case impinges on one of the deepest concerns of an industry burdened by a resurgence of racial classifications over the last decade.

STATEMENT

Amicus Curiae adopts the Statement of the Case as set forth in the Brief of Petitioner.

Additional references are made to portions of the record showing that the allegations supporting standing were before the court in Plaintiff's "Statement of Material Facts on Which There is No Genuine Issue" (R2-38-Par. 3-8), and that prior to enactment of the challenged ordinances minority-owned firms were receiving less than the amount set aside for minority participation.

SUMMARY OF ARGUMENT

The Amicus agrees with the Petitioner's position that the record is sufficient to demonstrate injury in fact. The court has been particularly clear that economic injury is not required in cases involving governmental classifications on the basis of race.

Petitioner has also satisfied the requirement that it show a realistic danger that its members do sustain a direct monetary injury as a result of the application of the challenged law.

In concluding that the Petition had not shown a likelihood of monetary harm the court failed to give Petitioner the inferences from its well-pleaded allegations.

ARGUMENT I

Petitioner's Members Suffered An Injury-In-Fact, Sufficient to Confer Standing, When They Suffered Exclusion From the Opportunity To Compete For City Contracts.

The Eleventh Circuit has adopted an excessively rigid and narrow rule that permits an individual excluded from competition for public contracts to challenge the basis for the exclusion only if he or she "would have bid more successfully on any one or more of [the] contracts." *Northeastern Florida Chapter v. City of Jacksonville*, 951 F.2d 1217, 1219 (11th Cir. 1992).

Citing its prior decision in *Cone v. Fla. Dept. of Transportation*, 921 F.2d 1190 (11th Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2238 (1991), the Eleventh Circuit held that the Petitioner lacked standing to challenge Jacksonville's practice of setting aside prime construction contracts, explaining:

> We are barred [from a decision on the merits of this case] by the decision in *Cone*, where a challenge by non-minorities to a set-aside program similar in operation to Jacksonville's was rejected for lack of standing because plaintiffs did not allege any specific contract lost on account of race. 921 F.2d at 1205-06; *accord Capeletti Brothers, Inc., et. al. v. Broward County*, 738 F.Supp. 1415, 1417 (S.D. Fla. 1990) (plaintiff failed to specify particular project by which it suffered injury), *aff'd*, 931 F.2d 903 (11th Cir.), cert. denied, ___ U.S. ___, 111 S.Ct. 2871, 115 L.Ed.2d 1037 (1991).

Northeastern Florida, 951 F.2d at 1219.

In *Cone*, the plaintiffs had challenged a Florida statute requiring "not less than 10 percent of the amounts expended from the State Transportation Trust Fund" to be expended "with small business concerns owned and controlled by socially and economically disadvantaged individuals," except "to the extent that the [Secretary of Transportation] determines otherwise. . . " 921 F.2d at 1200. Ultimately, the Eleventh Circuit found that the plaintiffs had failed to establish facts "from which the court could predict whether the Secretary would deny them equal

protection of the law in awarding future highway construction contracts," 921 F.2d at 1207, noting that evidence of contracts lost in the past or future would have satisfied this requirement. 921 F.2d 1205, n.49.

The Eleventh Circuit's position was derived from dicta in an earlier case in which the Ninth Circuit had found standing but not before questioning "whether [plaintiff] has alleged a more certain injury than a potential lost bid." See *Coral Constr. Co. v. King County*, 941 F.2d 910, 930 (9th Cir.), cert. denied, ___U.S. ___112 S.Ct. 875 (1992). *Cone* also cited a line of cases in which a disappointed bidder was held to have standing to challenge the award of a government contract to another firm. 921 F.2d at 1205, n. 49.

This Court has, however, held that a plaintiff can establish standing to mount a facial challenge to an ordinance by showing that the ordinance will be enforced against the plaintiff and pose a realistic danger of direct injury, traceable to the ordinance. *Pennell v. City of San Jose*, 485 U.S. 1, 8 (1988).

Writing for the *Pennell* Court, the Chief Justice observed that "application of the constitutional standing requirement [is not] a mechanical exercise." *Id.* at 7, citing *Allen v. Wright*, 468 U.S. 737, 751 (1984). The Chief Justice added that when standing is challenged on the basis of pleadings, this court will "accept as true all material allegations of the complaint, and . . . construe the complaint in favor of the complaining party." *Id.* at 7, citing *Warth v. Seldin*, 422 U.S. 490, 501 (1975). The Court held that the threat of enforcement to the disadvantage of the plaintiff association's members was "a sufficient threat

of actual injury to satisfy Article III's requirement that '[a] plaintiff...demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Id.* at 7-8, citing *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979).

Here, the Association has alleged that a city ordinance had excluded its members from competition for public contracts on the basis of race. Whether considered economic or non-economic, that competitive injury was a "demonstrable, particularized injury" to the plaintiff so that the plaintiff "w[ill] benefit in a tangible way" from court action. *Warth*, 422 U.S. at 508. This was sufficient injury-in-fact. Had the Court of Appeals construed the complaint in favor of the complaining party, it would have also found a "realistic danger" of direct injury resulting from the statute's operation or enforcement.

Babbitt, 442 U.S. at 299, involved election procedures that were alleged to burden freedom of Association. This Court held that it was not necessary for the plaintiffs to invoke those procedures in order to establish standing. The argument that this Court rejected was much like the argument that the Eleventh Circuit has made -- that delaying adjudication until the plaintiffs invoke the challenged procedures might mean a better factual record. 442 U.S. at 300. This Court held that "awaiting appellees' participation in an election would not assist our resolution of the threshold question whether the election procedures are subject to scrutiny under the First Amendment at all." *Id.* 442 U.S. at 301.

Under these circumstances, the Petitioner's claim that the uncontested allegations of its complaint were

sufficient to establish an injury-in-fact is extremely well-founded. Petitioner has cited the other relevant authorities and has briefed them well. AGC will pause, at this point, only to underscore the equal protection context in which this case arises. Numerous decisions of this Court have been that standing to mount an equal protection challenge to government laws or policies based on race does not require economic injury. *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (plaintiff need not show admission but for the discriminatory program); *Hunter v. Erickson*, 393 U.S. 385 (1969) (plaintiff need now show discrimination precluded actually buying property); *Wygant v. Bd. of Education*, 476 U.S. 267 (1986) (teacher made no showing she would have kept the job but for preference programs). *cf. International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 365-66 (1977) (futile application for employment unnecessary.)

The ruling in *Cone*, may well be tested again in this case. The City of Jacksonville has repealed the ordinance enjoined here by the district court and replaced it with one that gives city officials a wide discretion of preferential methods to employ, including "set-asides." City officials may be expected to cite *Cone* in defending the new law. Presumably the Petitioner will argue in a facial challenge that the factual predicate for the revised ordinance is inadequate to justify a program of racial preferences, or in the alternative that the program is not narrowly tailored to redress identified discrimination. See *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989).

Nevertheless, the *Cone* decision and its progeny, *supra* at 5, including the decision below, establish a very difficult test for standing in all equal protection cases and

perhaps all other cases in that circuit. In this equal protection case, where the contracts (1) were reserved exclusively for those who met the city's racial criteria, and (2) there was no showing of a remedial purpose, it was reversible error for the Eleventh Circuit to adopt the mechanical test of showing a lost contract as an essential element of standing.

ARGUMENT II

Favorable Inferences Drawn From Petitioner's Allegations Establish Financial Harm To The Petitioner's Members.

The favorable inferences that the Eleventh Circuit was required to draw from the Petitioner's uncontested allegations also established a realistic danger that member firms have suffered financial harm that can be directly traced to the challenged ordinance. The complaint leaves no realistic doubt that Petitioner's members would have been successful in bidding for contracts that the city had set aside, had these firms been permitted to bid.

The city set aside $14 million in public construction contracts under the challenged ordinance. *Northeastern Florida*, 951 F.2d at 1219. Petitioner is a trade association of 240 contractors, subcontractors, suppliers, and associates who regularly bid on and perform public construction contracts for the city. *Id.* at 1218. Ten per cent of the city's contracts were set aside for the members of certain racial groups precisely because, in spite of open competi-

tion in the past, less than that percentage of the city's contracts had gone to firms owned by members of those groups, (including "Spanish-speaking Americans," Eskimos and Aleuts.) Jacksonville Purchasing Code, § 126.603. The city submitted an affidavit from a city official that the program had increased minority participation in city contracting "by dollar volume." See Haskell affidavit ("RI-13-22). The only logical inference from these facts is that if a set-aside increases participation by the preferred businesses, it must decrease participation by Petitioner's members who are not the beneficiaries of the preference.

The Court of Appeals cited no record evidence that would support the conclusion that the association's members would not have been successful in open competition for "one or more" of the contracts that the city had set aside. For the court to imagine a scenario in which no non-minority firms would have been the low bidder for any of several million dollars a year in competitive bids is to fail to "construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490 (1975). Such a conclusion is "purely speculation." See *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 42 n.23 (1976). The certainty of enforcement and "the concomitant probability" of a lost contract were sufficient to satisfy Article III. *Pennell*, 485 U.S. 1, 8.

ARGUMENT III

Petitioner Met Its Burden of Proof.

The pleadings in support of standing were sufficient and it was incumbent upon the City to contest the facts at trial. On remand, the city opted to stand on the record it had made and not go to trial. Nevertheless, the Court of Appeals treated the allegations of injury as if they had been subject to proof after having been put into issue.

While there were cross-motions for summary judgment there was no challenge to standing. The facts regarding standing were not only in the complaint but were presented to the court in "Plaintiff's Statement of Material Facts on Which There is No Genuine Issue" (R2-38-Par. 3-8.)

This is not a case in which the reviewing court had evidence which bore on the question of standing, over and above what was in the compliant. See, e.g., *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 109, n. 22 (1979). Defendant's motion for summary judgment did not raise that question.

In *Gladstone Realtors*, this Court considered the issue of standing. After reviewing the record, the Court concluded:

> [T]he facts alleged in the complaints and revealed by initial discovery are sufficient to provide standing under Art. III. It remains open to petitioners, of course, to contest these facts at trial.

Id., 441 U.S. at 115.

This Court recently addressed the issue in *Lujan v. Defenders of Wildlife*, _____ U.S. ___, 112 S.Ct. 2130 (1992), where the Court held that plaintiffs had failed to prove sufficient injury-in-fact from environmental harms occurring outside the United States. The Court made a significant distinction between the proof required at the pleading stage of a case and that required to defeat a motion for summary judgment. The Court reiterated that at the pleading stage, general factual allegations may suffice. *Id.*, 112 S.Ct. at 2137

The significance of this distinction came into full view in *Lucas v. South Carolina Coastal Council*, ___ U.S. ___, 112 S. Ct. 2886 (1992). In that case, the plaintiff claimed that a state statute diminished the value of his property in violation of Takings Clause. The Court held that the plaintiff had alleged sufficient injury to sustain standing because the South Carolina court had foreclosed further pleading in regard to the damage claim. This Court addressed the question of standing "as if the case were here on the pleadings alone." *Lucas*, 112 S. Ct. at 2892, n.3. The Court stated that *Lujan*, by contrast, involved a motion for summary judgment requiring "specific facts to be adduced by sworn testimony." *Id.* If the *Lujan* Respondent had challenged the generalized allegations of injury-in-fact at the pleading stage, the challenge "would have been unsuccessful." *Id.*

AGC suggests that in a case such as this, where (1) standing is not contested on motion for summary judgment and (2) there is no other evidence in the record that challenges the plaintiff's allegation of standing, the issue should be reviewed as if the case were before the court on

the pleadings. On that basis, it is more than clear that the Petitioner met its burden of proof.

CONCLUSION

For the foregoing reasons the decision of the Court of Appeals should be reversed and the case remanded for further proceedings by the district court.

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No. 91-1721

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

NORTHEASTERN FLORIDA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA,

Petitioner,

v.

CITY OF JACKSONVILLE, FLORIDA and ED AUSTIN, in his official capacity as Mayor of the City of Jacksonville,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONER'S RESPONSE TO RESPONDENTS' MOTION TO DISMISS AS MOOT

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF FACTS 1

SUMMARY OF ARGUMENT 5

ARGUMENT 5

I. The Revised Ordinance Is No Different from the Original in Regard to AGC's Standing to Challenge It. 6

II. The City's Voluntary Revision of the Original Statute Does Not Render This Controversy Moot. 12

III. The Issue of Standing to Challenge Preferences in Government Contracts Will Remain Alive Between the City and AGC. . 14

CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Associated General Contractors of California, Inc. v. Coalition for Economic Equity, 950 F.2d 1401 (9th Cir. 1991), *cert. denied*, __ U.S. __, 112 S.Ct. 1670 (1992) 10

Associated General Contractors of Connecticut, Inc. v. City of New Haven, 130 F.R.D. 4 (D.Conn. 1990) 10

Baker v. Carr, 369 U.S. 186 (1962) 14

Board of Education of Oklahoma City Public Schools v. Dowell, ___ U.S. ___, 111 S.Ct. 630 (1991) 17

Burlington Northern Railroad Co. v. Brotherhood of Maintenance of Way Employees, 481 U.S. 429 (1987) 6, 15, 16

California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987) 16

Church of Scientology v. U.S., ___ S.Ct. ___, (Nov. 16, 1992) (No. 91-946) 17

City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 (1982) 12

City of Richmond v. J.A. Croson, Inc., 488 U.S. 469 (1989) 10

Cone Corp. v. Florida D.O.T., 921 F.2d 1190 (11th Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2238 (1991) 9, 16

Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia, 735 F.Supp. 1274 (E.D. Pa., 1990), *aff'd in relevant part*, 945 F.2d 1260 (3d Cir. 1991) 9

Coral Construction Co. v. King County, 941 F.2d 910 (9th Cir. 1991), *cert. denied*, __ U.S. __, 112 S.Ct. 875 (1992) 8, 10, 19

County of Los Angeles v. Davis, 440 U.S. 625 (1979) 13

Daley's Dump Truck Service, Inc. v. Kiewit Pacific Co., 759 F.Supp. 1498 (W.D. Wash., 1991) 9

DeFunis v. Odegaard, 416 U.S. 312 (1974) 15

Diffenderfer v. Central Baptist Church of Miami, Fla., Inc., 404 U.S. 412 (1972) 18

First National Bank of Boston v. Bellotti,
435 U.S. 765 (1978) 15, 16

Honig v. Doe, 484 U.S. 305 (1988) 15, 19

*Keyishian v. Board of Regents of Univ.
of State of New York*, 385 U.S. 589 (1967) 7

Kremens v. Bartley, 431 U.S. 119 (1977) 7

Lewis v. Continental Bank Corp.,
494 U.S. 472 (1990) 14, 18

*Maryland Highways Contractors Ass'n,
Inc. v. Maryland*, 933 F.2d 1246
(4th Cir.), *cert denied*, ___ U.S. ___,
112 S.Ct. 373 (1991) 9, 18

Michigan Road Builders Ass'n, Inc. v. Blanchard,
761 F.Supp. 1303 (W.D. Mich., 1991) 9

Murphy v. Hunt, 455 U.S. 478 (1982) 14

*National Independent Coal Operators'
Ass'n v. Kleppe*, 423 U.S. 388 (1976) 10

Nebraska Press Ass'n v. Stuart,
427 U.S. 539 (1976) 6

Northeastern Florida Chapter v. City of Jacksonville,
951 F.2d 1217 (11th Cir.), *cert. granted*, 113 S.Ct.
50 (1992) 1, 2, 16

O'Donnell Const. Co. v. District of Columbia,
963 F.2d 420 (D.C. Cir. 1992) 7, 9

*Press-Enterprise Co. v. Superior Court of California
for Riverside County*, 478 U.S. 1 (1986) 6, 16

Regents of University of California v. Bakke,
438 U.S. 265 (1978) 7

Roe v. Wade, 410 U.S. 113 (1973) 14

S. J. Groves & Sons Co. v. Fulton County,
920 F.2d 752 (11th Cir.), *cert. denied*,
___ U.S. ___, 111 S.Ct. 2274 (1991) 9

Sosna v. Iowa, 419 U.S. 393 (1975) 14

Super Tire Engineering Co. v. McCorkle,
416 U.S. 115 (1974) 7, 11, 15

Swann v. Charlotte-Mecklenburg Bd. of Ed.,
402 U.S. 1 (1971) 17

U.S. Brewers Ass'n, Inc. v. Rodriguez,
465 U.S. 1093 (1984) 7

U.S. v. Oregon State Medical Soc.,
343 U.S. 326 (1952) 19

U.S. v. W. T. Grant Co.,
345 U.S. 629 (1953) 13

Underground Contractors Ass'n v.
Metropolitan Water Reclamation
District of Greater Chicago,
No. 90-C-3586 (N.D. Ill. 1991) 9

United Fence & Guard Rail v. Cuomo,
No. 88CV-306 (N.D. N.Y. Oct. 6, 1991) 10

Vitek v. Jones, 445 U.S. 480 (1980) 13

Yee v. City of Escondido, Cal., __ U.S. __,
112 S.Ct. 1522 (1992) 17

Statutes and Secondary Authorities

Jacksonville Purchasing Code §126.601,
et seq. (1988) . . . . . 1, *passim*

Jacksonville Purchasing Code §126.601,
et seq. (1992) . . . . . 2, *passim*

STATEMENT OF FACTS

Petitioner, Northeastern Florida Chapter of the Associated General Contractors of America [hereinafter "AGC"], is an association of persons and firms in the construction industry doing business in Jacksonville and Duval County, Florida. Petitioner brought this suit on April 4, 1989, pursuant to 42 U.S.C. § 1983, challenging, both facially and as applied, the Minority Business Enterprise Programs administered by the City of Jacksonville [hereinafter "the City"][1]. Complaint, Record Vol. 1, Doc. 1 ["R-1-1"], ¶¶ 1, 50-51; Joint Appendix at JA-8, 19.

The ordinance set aside 10% of all city contracts for minority business enterprises. Jacksonville Purchasing Code ["City Code"] § 126.604 (1988) (capital improvements contracts), § 126.605 (other contracts); R-1-5, Exh. A; Petition Appendix at App. 15-21. The district court found the ordinance to be unconstitutional, R-3-69, Appendix to the Petition for Writ of Certiorari ["Petition Appendix"] at App. 7-13, and the City appealed. R-3-78.

The Eleventh Circuit Court of Appeals did not reach the merits of the City's program, but ordered the case dismissed without prejudice for lack of standing. *Northeastern Florida Chapter v. City of Jacksonville*, 951 F.2d 1217 (11th Cir.), *cert. granted*, 113 S.Ct. 50 (1992); R-4-81; Petition Appendix at App. 6. The court held that AGC lacked standing because it had not

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[1] AGC also named as defendants the Duval County School Board and its Chairman. After the district court enjoined enforcement of the programs, the school board suspended its programs and has not been a party to any of the subsequent proceedings.

shown "that, but for the [MBE] program, any AGC member would have bid successfully for any of [the City's] contracts." *Id.*, 951 F.2d at 1219; Petition Appendix at App. 5.

AGC filed a Petition for Writ of Certiorari, and this Court granted certiorari on October 5, 1992. The question presented to this Court in Petitioner's brief on the merits is whether

> an association challenging a racially exclusive government ordinance may establish standing by showing that its members are treated unequally in the bidding process for certain municipal contracts, or whether the association must show that its members actually would have received one or more of those contracts absent the ordinance?

Brief of Petitioner, p. i.

On October 28, 1992, little more than three weeks after this Court granted certiorari, the City of Jacksonville revised its ordinance. The new version of the MBE program is not substantially different from the old. First, the City has narrowed the program to include only African-Americans and women. City Code §126.601 (1992), Appendix to Respondents' Motion to Dismiss as Moot ["Motion to Dismiss"], p. A-7. The City also adjusted the original ordinance's requirement that 10% of city contracts go to minority businesses. City Code § 126.603, § 126.605 (1988), R-1-5, Exh. A, Petition Appendix at App.15 & 18. The revised version slightly reduces the percentage of minority preferences to 5% and 8% of all capital improvement contracts, City Code §126.604 (a)(1) (1992), Motion to Dismiss, p. A-15, 9% of contractual supplies and services contracts, *id.* §126.604(a)(2), and 6% to 7% of all professional services contracts. *Id.*, §126.604(a)(3). For fiscal year 1992 the

percentages are the same, except that the goal for capital improvements is 16% and 9%. *Id.*, §126.604(b)(1).

The original ordinance was straightforward, simply setting aside city contracts for minorities. City Code § 126.603, § 126.605 (1988), R-1-5, Exh. A, Petition Appendix at App.15 & 18. The new version of the City's preference program retains the set-aside feature and adds four other ways that the City can reach its goals of minority participation. City Code § 126.605 (1992), Motion to Dismiss, pp. A-20-30. The methods from which the City can choose are: (1) the Participation Percentage Plan, *id.*, § 126.605(a); (2) the Sheltered Market Plan, *id.*, § 126.605(b); (3) the Direct Negotiation Plan, *id.*, § 126.605(c); (4) the Bid Preference Plan, *id.*, § 126.605(d); and (5) the Impact Plan, *id.*, § 126.618, Motion to Dismiss, pp. A-63-75.

The Participation Percentage allows the City to require minority subcontracting participation for particular projects. *Id.*, § 126.605(a), Motion to Dismiss, p. A-21. African-American and women-owned firms retain an advantage over other contractors because a minority firm "may meet the set participation percentages for the respective classifications by applying its dollar value excluding noncertified [non-minority] Business Enterprise subcontractors under the award." *Id.*, Motion to Dismiss, p. A-22.

The Sheltered Market Plan is another name for set-asides. This plan allows the City to designate certain projects "for the exclusive competition of certified African-American and Women's Business Enterprises." *Id.*, § 126.605(b). Motion to Dismiss, p. A-26.

When the City utilizes the Direct Negotiation Plan, it need not even submit the project for bids. Rather, the City commences

"direct negotiations with certified African-American or Women's Business Enterprises." *Id.*, § 126.605(c), Motion to Dismiss, p. A-27. The City may avoid the bidding process only for professional service contracts less than $50,000.00. *Id.*

When the City uses the Bid Preference Plan, it specifies preferences of "up to five percent (5%) and not more than Five Thousand Dollars ($5,000)" for minority firms. *Id.*, § 126.605(d), Motion to Dismiss, p. A-28. For these contracts, the City must award the contract "to the lowest responsible bidder or to the [minority] enterprise whose bid is within the percentage or dollar amount of the lowest responsible bid." *Id.*

The Impact Plan grants unspecified point values to bidders who are minority firms or assist minorities in specified ways. *Id.*, § 126.618(1), Motion to Dismiss, pp. A-64-65. These values are factored into the bid price to obtain a "value cost" for each bid. *Id.*, § 126.618(2), Motion to Dismiss, p. A-66. A City Committee will then evaluate the bids and recommend the "lowest and best responsive and responsible evaluated bid." *Id.*, § 126.618(5) Motion to Dismiss, p. A-68. The plan grants a maximum bid preference of 15% above the "total price of the lowest responsive, responsible bid or proposal." *Id.*, § 126.618 (6).

This revised version of the City's preferences in municipal contracts is the subject of Respondents' Motion to Dismiss as Moot. Petitioner submits this response in accordance with Rule 21 of the Rules of the Supreme Court of the United States.

SUMMARY OF ARGUMENT

The City's revision of its minority participation ordinance does not affect the question upon which this Court granted certiorari -- whether AGC has standing to challenge the City's system of minority preferences. The latest version of the ordinance does not remove the unequal burdens placed on non-minority contractors and does not change the allegations upon which AGC bases its standing to challenge those unequal burdens. Furthermore, the fact that the City has voluntarily changed its unconstitutional behavior does not make AGC's challenge to its program moot. Finally, the issue of standing to contest preferences in government contracts will recur, involving these same two parties, and prevents the current case from becoming moot.

ARGUMENT

Although in many situations the amendment of a statute will render a case moot, this is not such a case. A legislature cannot avoid judicial review by making technical changes in a statutory scheme, particularly where, as in this case, the legislature makes its changes three weeks after this Court granted certiorari. So long as the same issues remain in controversy between the same parties, this Court will not allow one party to unilaterally avoid resolution of those issues.

I. The Revised Ordinance Is No Different from the Original in Regard to AGC's Standing to Challenge It.

The revisions in the City's system of minority preferences do not affect the issue on which this Court granted certiorari -- the standing of contractors to challenge unequal treatment in government contracting. As explained in the Brief of Petitioner, the issue before this Court is how federal courts define "injury-in-fact" when determining standing in equal protection cases. The City defends the Eleventh Circuit's rule that defines injury only as a specific type of economic harm -- loss of a specific contract. AGC, however, has urged this Court to follow its long-standing precedent in equal protection cases and define injury as unequal treatment in bidding for government contracts. That issue remains alive in this case; the October, 1992 revision does nothing to resolve or neutralize it.

The City misconstrues the mootness analysis as whether AGC will be subjected again to the old ordinance. The correct question, however, is not which version of its preferences the City will apply, but whether "these same parties are likely to find themselves again in dispute over *the issues raised in this petition.*" *Burlington Northern Railroad Co. v. Brotherhood of Maintenance of Way Employees*, 481 U.S. 429, 436 n.4 (1987) (emphasis added). *See also*, *Press-Enterprise Co. v. Superior Court of California for Riverside County*, 478 U.S. 1, 6 (1986) (challenge to already-expired court order was not moot where it was likely that newspaper would be subjected to similar order in the future); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 546-47 (1976).

The issue in this petition is whether AGC has standing, absent evidence of a specific lost contract, to challenge the City's preferences in government contracting. That issue remains a live controversy between these parties so long as the City grants such preferences.

The City has not completely replaced its statutory scheme for granting preferences to certain contractors. *Cf.*, *U.S. Brewers Ass'n, Inc. v. Rodriguez*, 465 U.S. 1093 (1984); *Kremens v. Bartley*, 431 U.S. 119 (1977). It has only modified certain aspects of its minority business policy. Although the percentages have changed slightly, it is still clear that for some contracts the City will treat non-minority businesses differently than minority firms. "The substance of the statutory and regulatory complex remains," *Keyishian v. Board of Regents of Univ. of State of New York*, 385 U.S. 589, 596 (1967), as a "continuing and brooding presence [that] casts what may well be a substantial adverse effect on the interests of the petitioning parties." *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 122 (1974).

The fact that the City now phrases its objectives as "goals" is not a substantive change in the law. A "semantic distinction is beside the point . . . Whether this limitation is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status." *Regents of University of California v. Bakke*, 438 U.S. 265, 289 (1978). Furthermore, these "goals" are "far more than merely a hope, a wish or an aspiration." *O'Donnell Construction Co. v. District of Columbia*, 963 F.2d 420, 423 (D.C. Cir. 1992). The City has no more discretion under the October, 1992 revision to ignore its "goals" than it did with the original program. *See, e.g.*, City Code § 126.618(4) (1992), Motion to Dismiss at p. A-67-68. ("In the event the Impact Plan is not achieving the

Participation Goals, then the Chief may adjust the relative weighted point values for each of the impact criteria"). The City still must award a certain amount of contracts according to racial and gender classifications.

The City also has retained methods of meeting its goals that treat contractors differently according to their race. All five of the City's alternative plans mandate the same sort of unequal treatment that AGC challenged originally. The City disingenuously claims that "all bidders are permitted to compete for City contracting." Motion to Dismiss, p. 11. Certainly AGC members can bid. They simply will not be considered for certain contracts. City Code §126.605(a) (1992), Motion to Dismiss at A-21 (under Participation Percentage Plan, contract awarded to bid that "meets the set participation percentages" or to low bidder who has made good faith efforts to meet percentages); -605(b), Motion to Dismiss at A-26 (Sheltered Market Plan; certain contracts "for exclusive competition of" minority firms); -605(c), Motion to Dismiss at A-27 (Direct Negotiation Plan; City commences "direct negotiations" with minority firms without accepting bids); -605(d), Motion to Dismiss at A-28 (Bid Preference Plan; contract awarded to bid "within the percentage or dollar amount of the lowest responsible bid").

Insofar as standing is concerned, then, the two ordinances do not differ. AGC non-minority members still will be unable to compete equally for those contracts designated for preferential treatment. It is an "objectively unequal bidding process" that injures non-minority firms every time they place a bid. *Coral Construction Co. v. King County*, 941 F.2d 910, 930 (9th Cir. 1991), *cert. denied*, __ U.S. __, 112 S.Ct. 875 (1992). Standing remains a live controversy between AGC and the City of

Jacksonville under either the old ordinance or its latest incarnation.

The fact that standing remains an issue under whatever statute the City prefers is illustrated by the treatment of this question in various federal courts. The Eleventh Circuit, for example, has applied its "specific lost contract" rule to cases involving both set-asides and subcontractor participation goals. *Cone Corp. v. Florida D.O.T.*, 921 F.2d 1190, 1196 (11th Cir.) (set-aside and subcontractor participation goals), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2238 (1991); *S. J. Groves & Sons Co. v. Fulton County*, 920 F.2d 752, 756 (11th Cir.) (subcontractor participation goals), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2274 (1991). Similarly, the other courts that have adopted the "specific contract" rule have not distinguished between set-asides and other types of MBE programs. *Maryland Highways Contractors Ass'n, Inc. v. Maryland*, 933 F.2d 1246, 1248-49 (4th Cir.) (subcontractor participation goals), *cert denied*, ___ U.S. ___, 112 S.Ct. 373 (1991); *Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 735 F.Supp. 1274, 1278-79 (E.D. Pa., 1990) (sheltered market and subcontractor participation goals), *aff'd in relevant part*, 945 F.2d 1260 (3d Cir. 1991); *Daley's Dump Truck Service, Inc. v. Kiewit Pacific Co.*, 759 F.Supp. 1498, 1499 (W.D. Wash., 1991) (subcontractor set-asides); *Michigan Road Builders Ass'n, Inc. v. Blanchard*, 761 F.Supp. 1303, 1305 (W.D. Mich., 1991) (set-aside program); *Underground Contractors Ass'n v. Metropolitan Water Reclamation District of Greater Chicago*, No. 90-C-3586 (N.D. Ill. 1991) (subcontractor participation goals).

The courts that have found sufficient injury in unequal consideration for government contracts also have applied the same criteria to different types of minority preference programs.

O'Donnell Construction Co., 963 F.2d at 422 (sheltered market for contractors and subcontractors); *Associated General Contractors of California, Inc. v. Coalition for Economic Equity*, 950 F.2d 1401, 1403-04 (9th Cir. 1991) (set-asides and bid preferences), *cert. denied*, __ U.S. __, 112 S.Ct. 1670, (1992); *Coral Construction Co.*, 941 F.2d at 914 (bid preferences and subcontractor set-asides); *United Fence & Guard Rail v. Cuomo*, No. 88CV-306 (N.D. N.Y. Oct. 6, 1991) (subcontractor participation goals); *Associated General Contractors of Connecticut, Inc. v. City of New Haven*, 130 F.R.D. 4, 6 (D.Conn. 1990) (set-asides). The specifics of a minority preference program, then, do not change the criteria for standing to challenge such a program. Whether the City enforces its original ordinance or the October, 1992 version, the issue on which this Court granted certiorari remains the same. *Cf.*, *National Independent Coal Operators' Ass'n v. Kleppe*, 423 U.S. 388, 393 n. 4 (1976) (case not moot because "there are assessments under the contested regulations awaiting enforcement and because the new regulations also do not provide a hearing unless one is requested").

The fact that the City, in an attempt to comply with *City of Richmond v. J.A. Croson, Inc.*, 488 U.S. 469 (1989), conducted a study before enacting the 1992 version of the ordinance does not make it a different statute insofar as this petition is concerned. The issue currently before this Court is not the merits of the original ordinance, but AGC's standing to challenge it. Any new or amended complaint that AGC would file to challenge the October, 1992 changes would contain the same allegations as its earlier complaint: (1) that AGC members "regularly bid on and perform construction work for the City of Jacksonville,"

Complaint ¶ 9, R-1-1, Joint Appendix at JA-10; (2) that the City has "set aside construction and procurement contracts and [has] restricted bidding on and awarding of such contracts to only [minority business enterprises]," *id.*, ¶ 45, R-1-1, Joint Appendix at JA-18; (3) that the City does not "have an adequate factual basis" for the program, *id.*, ¶ 32, R-1-1, Joint Appendix at JA-15; (4) that the percentage determined by the City "is not narrowly tailored to the elimination of any continuing effect of any prior discrimination," *id.*, ¶ 42, R-1-1, Joint Appendix at JA-17; and (5) that the minority set-asides and preferences deprive "numerous non-minority members of Plaintiff AGC of equal protection of the law in violation of the Fourteenth Amendment to the United States Constitution by . . . discriminating against them on the basis of race." *Id.*, ¶ 50, R-1-1, Joint Appendix at JA-19. These allegations squarely present the issue of standing to this Court, no matter which version of preferences the City decides to use.

The City continues to place burdens on some contractors that it does not place on others. AGC's standing to challenge those burdens remains the same question under the original ordinance or the latest version. AGC has shown to this Court "an immediate and definite governmental action or policy that has adversely affected and continues to affect a present interest" in equal consideration for government contracts. *McCorkle*, 416 U.S. at 125-26. That policy has not changed, nor has the question to be decided by this Court.

II. The City's Voluntary Revision of the Original Statute Does Not Render This Controversy Moot.

The City's argument that AGC's petition is moot because the City revised its program confuses the merits of the ordinance with the issue of standing. The City in essence is claiming that because it has replaced its unconstitutional program with a constitutional one, AGC lacks standing to challenge either. The fact that the City claims to have changed its unconstitutional behavior, however, does not render moot the question of AGC's standing to challenge that behavior. The simple fact that a government voluntarily repeals a statute after a court challenge does not prevent a federal court from reviewing issues presented on appeal.

One example of this doctrine is *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982). The plaintiff challenged a city ordinance that allowed the Chief of Police to deny licenses to applicants who had "connections with criminal elements." *Id.*, 455 U.S. at 285. The district court held that the phrase, even as defined in amended statutes, was unconstitutionally vague. *Id.*, 455 U.S. at 288. After this Court noted probable jurisdiction, the city eliminated the phrase entirely. *Id.*

Even though the challenged phrase no longer existed in the city's ordinances, this Court did not consider the case moot. "It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Id.*, 455 U.S. at 289. The Court considered the question of mootness in such circumstances to be "a matter relating to the exercise rather than the existence of judicial power." *Id.* Because of the real

possibility that the city would restore the language if this Court considered the case moot and dissolved the district court's injunction, *id.*, 455 U.S. at 289 n. 11, the Court decided to resolve the issue presented to it.

Similarly, the question of standing is not moot in the current case. The normal Article III principles underlying mootness do not control, *id.* at 289, and this Court can exercise its discretion to prevent the City from creating a moving target for those who would challenge its ordinances.

The City will continue to subject AGC members to unequal treatment based on the same criteria it used in 1989. In fact, unlike the city of Mesquite, Jacksonville did not even eliminate its statute. The City simply made some changes in its program. Given that fact, it is far from "absolutely clear" that the City would not continue in its wrongful behavior. *Vitek v. Jones*, 445 U.S. 480, 487 (1980). Not only is there a possibility that a finding of mootness would leave "[t]he defendant . . . free to return to his old ways," *U.S. v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953), but the defendant in this case already has done so.

The City has not met its "heavy burden," *W. T. Grant*, 345 U.S. at 633, of showing that its October, 1992 ordinance has "completely and irrevocably eradicated the effects" of the old unconstitutional program. *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). The City's claim that its behavior is now constitutional is merely an unsupported allegation and in any event is completely separate from the standing issue that this Court decided to hear. No court has ruled on the validity of the City's new program, and under the Eleventh Circuit rule no court will be able to do so until some fortunate plaintiff is able to show loss of a specific contract. Judicial review of the City's latest, or any

other, version of its race-conscious program of preferences cannot proceed until this Court determines the separate issue of who has standing to sue. The City's voluntary revision of its preferences program does not deprive this Court of jurisdiction to decide that issue.

III. The Issue of Standing to Challenge Preferences in Government Contracts Will Remain Alive Between the City and AGC.

In cases other than voluntary abandonment of a challenged policy, this Court has treated mootness as an aspect of Article III jurisdiction. *Lewis v. Continental Bank Corp.*, 494 U.S. 472 (1990); *Sosna v. Iowa*, 419 U.S. 393 (1975). As in standing, the concern is that the parties have a continuing "personal stake" in the resolution of the case. *Lewis*, 110 S.Ct. at 1254 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

This Court long has recognized that a party can have a "personal stake" in the resolution of a particular issue, even though the outcome of the specific case may no longer be relevant. *E.g.*, *Roe v. Wade*, 410 U.S. 113 (1973). In such cases, federal courts will rule on the merits of the issue presented to them.

In this case, there is a "reasonable expectation that the same complaining party [will] be subjected to the same action again." *Murphy v. Hunt*, 455 U.S. 478, 482 (1982). All of the facts demonstrate that AGC members will bid for contracts awarded by the City of Jacksonville, and that the City will subject non-minority firms to unequal treatment in the bidding process.

In this case, there is much more than the requisite

"reasonable expectation" that the City will once again engage in the misconduct that AGC originally challenged. *Honig v. Doe*, 484 U.S. 305, 318 n. 6 (1988); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 775 (1978). The City has adjusted the formulation of its preferences, but it still grants preferences in municipal contracts to groups to which many AGC members do not belong.

Furthermore, the same parties will be involved in the continuing dispute over standing to challenge the City's preferences. *Burlington Northern Railroad Co.*, 481 U.S. at 436 n. 4; *DeFunis v. Odegaard*, 416 U.S. 312 (1974); *McCorkle*, 416 U.S. 115 (1974). There is a "demonstrated probability," *Honig*, 484 U.S. at 318 n. 6, that AGC members, as contractors who "regularly bid on and perform construction work for the City of Jacksonville," Complaint ¶ 9, R-1-1, Joint Appendix at JA-10, will be subjected to the City's racial preferences. In fact, more AGC members will face unequal treatment under the revised ordinance than before. The 1992 ordinance excludes many groups, such as Spanish-speaking Americans, Orientals, and Native American Indians, who were defined as minorities in the old MBE plan. *Compare* Jacksonville City Code § 126.603 (1988), Petition Appendix at App. 15, *and* City Code § 126.603 (1992), Motion to Dismiss, pp. A-9 and A-14. Thus, some contractors who benefitted from the 1988 preferences will find themselves excluded from equal consideration by the revised version.

The probability that AGC members will bid for City contracts and be treated unequally is as reasonable as those expectations this Court has approved in other cases. *See, e.g.*, *Honig*, 484 U.S. at 317-321 (student likely to re-enter school system and be subjected to challenged educational policies);

Burlington Northern Railroad Co., 481 U.S. at 436 n.4 (parties "reasonably likely" to find themselves again involved in strike dispute); *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 578 (1987) (plaintiff likely to submit new plans of operation; live issue remained whether state agency could enforce conditions placed on federal permit); *Press-Enterprise Co.*, 478 U.S. at 6 ("[i]t can reasonably be assumed" that newspaper would be subjected to order similar to the now-expired one it challenged); *Bellotti*, 435 U.S. at 775 (appellants "insist they will continue" opposition to income tax amendment; "no reason to believe" state will not enforce statute prohibiting contributions for such issues). The prospect of AGC's challenging the City's October, 1992 ordinance is a similarly reasonable expectation and distinct probability.

The vitality of the standing controversy is illustrated by the almost certain course of events should this Court find the instant petition to be moot. Whether AGC uses a new or amended complaint to challenge the revised ordinance, the district court will be obligated to dismiss the case for lack of standing. *Cone Corp.*, 921 F.2d 1190. *Northeastern Florida Chapter*, 951 F.2d 1217. The Eleventh Circuit will affirm that dismissal, *id*, and AGC once again will petition this Court to review the very issue that is before the Court now. That is, of course, unless the City revises its statute yet again and continues to avoid judicial review of the preferences it grants in municipal contracts.

As this scenario demonstrates, the original reasons that this Court granted certiorari still exist, no matter how the City adjusts its program. The federal courts will continue to adopt conflicting rules for standing to challenge programs such as the one in this case. The "specific contract" rule of the Eleventh Circuit will

continue to violate this Court's precedent regarding standing in equal protection cases. This Court considers carefully which issues are worthy of its attention, *Yee v. City of Escondido, Cal.*, __ U.S. __, 112 S.Ct. 1522, 1533 (1992), and the City should not be allowed to short-circuit the Court's review of the issue in this case.

Furthermore, it is far from clear that the City's revision of its ordinance moots the relief that AGC won in the district court. The injunction that the district court issued left the City free "to enact legislation it so deems advisable, and, *complies with the constitutional mandates* of *Croson* and *Fullilove*." Order Granting Plaintiff's Motion for Summary Judgment, R-3-69; Petition Appendix at App.13 (emphasis added). There is no evidence that the City's revised ordinance complies with constitutional standards, and such a discussion would not be appropriate for review by this Court on this petition. The proper procedure would be for either the City or AGC to petition the district court to determine whether the revised ordinance complies with the court's injunction. *Cf.*, *Board of Education of Oklahoma City Public Schools v. Dowell*, ___ U.S. ___, 111 S.Ct. 630, 634 (1991) (parents of students filed motion to reopen school desegregation case); *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 7 (1971) (parents petitioned court for further relief in light of new Court rulings). Such a possibility of further relief in the district court would be sufficient to prevent this case from becoming moot. *Cf.*, *Church of Scientology v. U.S.*, ___ S.Ct. ___, (Nov. 16, 1992) (No. 91-946) (case not moot because court could grant some degree of relief).

In this case, however, neither AGC nor the City can ask the district court to review the changed ordinance as subject to the original injunction. The district court, on instructions from the

Eleventh Circuit, has dismissed the case for lack of standing. R-4-82. Until this Court decides the issue on which it granted certiorari, AGC's standing to challenge the City's system of racial preferences, AGC cannot seek court review of the City's adjustments to its prior unconstitutional actions.

For the same reasons, it will not advance this case for the Court to remand the case for consideration of the impact of the 1992 revisions on AGC's original challenge. *See, e.g., Lewis*, 110 S.Ct. at 1256; *Diffenderfer v. Central Baptist Church of Miami, Fla., Inc.*, 404 U.S. 412, 415 (1972). Because the district court has dismissed the case, it cannot consider mootness until this court decides the standing issue.

Standing is a live controversy between AGC and the City, and will continue until this Court approves or disapproves the Eleventh Circuit's "specific contract" rule. AGC has a personal stake in its current challenge that has continued beyond the change in the statute and will continue into the future.

If this Court decides to wait for another case to resolve the standing controversy, the lower courts will continue to split over the issue, even in cases that may be moot. The Fourth Circuit, for example, announced its standing rule in a case that it specifically held was moot. *Maryland Highway Contractors Ass'n, Inc.*, 933 F.2d 1246. The state replaced its challenged ordinance with new program that, based on a new study, narrowed the classes of minorities who would benefit from the program. "Most of the remaining provisions in the MBE statute were not changed by the new MBE law." *Id.*, 933 F.2d at 1249. The Fourth Circuit found the case to be moot, *id.* at 1250. Nevertheless, "because of the likelihood of a new attack upon the constitutionality of the present Maryland MBE statute," *id.*, the court elected to announce a new

rule for standing. *Cf.*, *Coral Construction Co.*, 941 F.2d 910, (amendments to MBE program did not render request for declaratory and injunctive relief moot). The U.S. Supreme Court is "at present the only Art. III court" that can decide the standing issue in cases such as the instant one "in such a way as to bind all other courts." *Honig*, 484 U.S. at 332 (Rehnquist, C.J., concurring).

AGC has suffered injury from Respondent's insistence on using preferences in awarding government contracts, and continues to suffer injury from the Eleventh Circuit's "specific contract" rule. The City's substitution of five methods of racial preferences for one does not deprive this Court of jurisdiction to decide AGC's standing to challenge the City's program. Federal courts should "beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption." *U.S. v. Oregon State Medical Soc.*, 343 U.S. 326, 333 (1952). In this case, the City has resumed its program and should not succeed in continuing to avoid judicial review.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests that this Court deny Respondents' Motion to Dismiss as Moot and all relief requested therein.

Respectfully submitted,

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No. 91-1721

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

NORTHEASTERN FLORIDA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA,
Petitioner,

v.

CITY OF JACKSONVILLE, FLORIDA AND TOMMY HAZOURI, in his official capacity as Mayor of the city of Jacksonville,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE STATES OF OHIO AND MICHIGAN AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. SUBSEQUENT TO THE FILING OF THE PETITION FOR CERTIORARI IN THIS CASE, RESPONDENTS REPEALED THE LEGISLATION BEING CHALLENGED HEREIN AND REPLACED IT WITH A SIGNIFICANTLY DIFFERENT LEGISLATIVE SCHEME. CONSEQUENTLY, THIS CASE IS MOOT AND SHOULD BE DISMISSED. IN THE ALTERNATIVE, BECAUSE THE CHANGES IN LEGISLATION MAKE IT DIFFICULT TO ADJUDICATE THIS CASE BASED ON THE PRESENT RECORD, THE JUDGMENT OF THE COURT BELOW SHOULD BE VACATED AND THE CASE REMANDED WITH INSTRUCTIONS TO PERMIT PETITIONER TO AMEND ITS COMPLAINT 3

A. This Case Is Moot 3

B. At The Very Least, The Judgment Should Be Vacated And The Case Remanded For Additional Proceedings. 7

II. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT PETITIONER LACKS STANDING TO CHALLENGE JACKSONVILLE'S MBE PROGRAM 9

Page

A. MBE Programs Are Important Tools For Eradicating Documented Discrimination. An Associational Plaintiff Must, Therefore, Plead Sufficient Facts To Demonstrate Its Standing To Sue. 10

B. The Judgment Below Was Mandated By This Court's Prior Cases on Standing. 11

C. The Formulation For Standing Offered by Amici States Ohio And Michigan Best Serves Public Policy. 15

CONCLUSION 17

APPENDIX A-1

TABLE OF AUTHORITIES

CASES **Page**

Allen v. Wright, 468 U.S. 737 (1984) 12, 15

Board of Airport Commissioners of the City of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569 (1987) 7

City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 (1982) 5-7

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 4, 5, 7, 10

Diffenderfer v. Central Baptist Church, 404 U.S. 412 (1972) 2, 8-10

Duke Power Company v. Greenwood County, 299 U.S. 259 (1936) 4

Fusari v. Steinberg, 419 U.S. 379 (1975) 2, 7-9

Lujan v. Defenders of Wildlife, ___ U.S. ___, 112 S. Ct. 2130 (1992) 11, 16

Princeton University v. Schmid, 455 U.S. 100 (1982) 2, 4, 5, 7, 9

United States v. Munsingwear, 340 U.S. 36 (1950) 4, 8, 9

University of California Regents v. Bakke, 438 U.S. 265 (1978) 3, 12, 14, 15

Village of Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977) 12

Warth v. Seldin, 422 U.S. 490 (1975) 3, 11-15

TABLE OF AUTHORITIES (cont'd.)

CASES **Page**

OTHER AUTHORITIES

City of Jacksonville Code Section
126.601-.613 (1988) 3

City of Jacksonville Code Section
126.601 - .617 (1992) 3

No. 91-1721

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

NORTHEASTERN FLORIDA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA,
Petitioner,

v.

CITY OF JACKSONVILLE, FLORIDA and TOMMY HAZOURI, in his official capacity as Mayor of the city of Jacksonville,
Respondents.

On Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

BRIEF OF THE STATES OF OHIO AND MICHIGAN AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICI CURIAE

The States of Ohio and Michigan have promulgated minority business enterprise legislation ("MBE programs") designed to redress discrimination based on race, sex, or nationality in respect to the award of public contracts. Because these programs play an important role in leveling, within constitutional limits, the playing field of government-contract bidding, it is essential that any complaint challenging an MBE program contain allegations reflecting unmistakably the right of the plaintiff to sue. First and foremost, the complaint must contain information sufficient to satisfy all the constitutional and jurisprudential requirements, including standing, associated with invoking the jurisdiction of a federal court.

In the instant case, Petitioner challenges the MBE program of the city of Jacksonville and proffers what Amici States assert is an incomplete test for establishing its standing to sue. Petitioner's standard relaxes the traditional test for evaluating standing, not only in general, but specifically in respect to challenges to race-conscious programs. Because this poses a threat to the proper operation of said programs and will unnecessarily tax the legal and financial resources of any state employing such a program to help eradicate discrimination, Amici states file this brief in support of Respondents and urge this Court to affirm the judgment of the United States Court of Appeals for the Eleventh Circuit.

SUMMARY OF ARGUMENT

1. Subsequent to the Court's grant of a writ of certiorari in this case, the City of Jacksonville repealed the portion of its Purchasing Code challenged by Petitioner and substituted for it a significantly revised legislative scheme. Consequently, this case is before this Court in a posture similar to that of *Princeton University v. Schmid*, 455 U.S. 100 (1982) (per curiam), a case rendered moot by legislative changes, or *Fusari v. Steinberg*, 419 U.S. 379 (1975), in which the Court determined that substantive changes in the legislation in question prevented the Court from "meaningfully . . . assess[ing] the issues in this appeal on the present record." *Id.* at 387. As a result, this action should be remanded with instructions to the courts below to dismiss without prejudice, or the judgment should be vacated and the case remanded with instructions to give Petitioner a reasonable opportunity to amend its complaint. *See id.*, 419 U.S. at 390. *See also Diffenderfer v. Central Baptist Church*, 404 U.S. 412, 412 (1972).

2. In the event this Court chooses to address the question of standing, it must do so "in light of [Jacksonville] law as it stands now, not as it stood when the judgment below was entered." *Diffenderfer*, 404 U.S. at 414. Under the new or old Jacksonville MBE program, however, Petitioner's theory for establishing its standing represents a departure from the Court's historical perspective on the subject and is

inconsistent with the Court's application of the standing doctrine in relevant cases, such as *University of California Regents v. Bakke*, 438 U.S. 265 (1978), and *Warth v. Seldin*, 422 U.S. 490 (1975).

ARGUMENT

I. SUBSEQUENT TO THE FILING OF THE PETITION FOR CERTIORARI IN THIS CASE, RESPONDENTS REPEALED THE LEGISLATION BEING CHALLENGED HEREIN AND REPLACED IT WITH A SIGNIFICANTLY DIFFERENT LEGISLATIVE SCHEME. CONSEQUENTLY, THIS CASE IS MOOT AND SHOULD BE DISMISSED. IN THE ALTERNATIVE, BECAUSE THE CHANGES IN LEGISLATION MAKE IT DIFFICULT TO ADJUDICATE THIS CASE BASED ON THE PRESENT RECORD,THE JUDGMENT OF THE COURT BELOW SHOULD BE VACATED AND THE CASE REMANDED WITH INSTRUCTIONS TO PERMIT PETITIONER TO AMEND ITS COMPLAINT.

The Eleventh Circuit ruled that Petitioner did not have standing to challenge Jacksonville's MBE program and remanded the case to the district court with instructions to dismiss without prejudice. Subsequent to the judgment below and the grant of certiorari, the City of Jacksonville repealed the ordinances challenged in this case and replaced them with a new legislative scheme. *Compare* City of Jacksonville Ordinance Code § 126.601-.613 (1988), *with* City of Jacksonville Ordinance Code § 126.601- .617 (1992). *See* Appendix to Respondent's Motion to Dismiss. This turn of events has rendered this case moot, or, at the very least, has made additional review by the lower courts necessary.

A. This Case Is Moot.

1. Petitioner, plaintiff below, challenges Jacksonville's MBE program, which "sets aside" for minority businesses

a small percentage of the city's construction work, because it allegedly bars Petitioner's non-minority members from competing for that work and because it was established without the benefit of a formal study documenting the existence of prior discrimination within Jacksonville, as required by this Court's decision in *City of Richmond v. Croson Co.*, 488 U.S. 469 (1989). See Complaint, Joint Appendix at 7. According to Respondent's Motion to Dismiss as Moot, however, the ordinance actually under attack has been repealed and replaced with an MBE program that is significantly different: not only was the new ordinance promulgated after a *"Croson"* study, but "[u]nder the new ordinances, all bidders are unquestionably permitted to compete for [all] city contracting . . . ." Memorandum in Support of Respondents' Motion to Dismiss as Moot, at 8-9, 11. As a result, the purported outright bar against non-minority contractors competing for "set-asides" and the lack of a study documenting the appropriateness of an MBE program, the twin foundations of Petitioner's legal challenge, no longer are components of Jacksonville law or at issue in this case.

Thus, this Court is presented with circumstances not unlike those in *Princeton University v. Schmid*, 455 U.S. 100, 103 (1982) (per curiam):

> . . . the regulation at issue is no longer in force. Furthermore, the lower court's opinion was careful not to pass on the validity of the revised regulation under either the Federal or the State Constitution. Thus, the issue of the validity of the old regulation is moot, for this case has "lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract questions of law." *Hall v. Beals*, 396 U.S. 45, 48 (1969) (per curiam).

When a case becomes moot pending appeal, the Court's custom is to "reverse the judgment below and remand with a direction to dismiss." *United States v. Munsingwear*, 340 U.S. 36, 39 (1950) (footnote omitted). *Accord, Duke Power*

Company v. Greenwood County, 299 U.S. 259, 267 (1936) (dismissal of case that becomes moot pending appeal is the "duty of the appellate court").

That the circumstances of this case result in a finding of mootness was presaged by the Court's opinion in *Croson*. In *Croson*, the plaintiff, unlike Petitioner here, sought damages in addition to prospective relief. Richmond's MBE program expired on June 30, 1988, over three months prior to argument before the Court and almost seven months prior to the decision. The Court addressed the issue of mootness in a footnote, explaining that "[t]he expiration of the ordinance has not rendered the controversy between the city and appellee moot. There remains a live controversy between the parties over whether Richmond's refusal to award appellee a contract pursuant to the ordinance was unlawful and thus entitles appellee to damages." *Croson*, 488 U.S. at 478 n.1 (citations omitted). Thus, the strong implication of the preceding passage is that in respect to prospective relief, the case *was* moot. Although the challenged Jacksonville ordinances, rather than having expired, have been repealed, the effect is the same — they no longer exist.

Although the plain language of *Princeton* appears dispositive on the issue of mootness, a discussion of mootness in the context of this case would not be complete without some mention of what may, on first blush, appear to be a competing line of the Court's cases. For example, in *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982), a case argued the same day as *Princeton* and decided approximately one month later, the Court refused to declare moot a case in which judicially invalidated legislation was repealed while an appeal was pending before the Fifth Circuit. The Court noted that "[i]t is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite*, 455 U.S. at 289.

But the Court's statement cannot be separated from the peculiar facts of that case:

> In this case the city's repeal of the objectionable language would not preclude it from reenacting precisely the same provision if the District Court's judgment were vacated (footnote omitted). The city *followed that course* with respect to the age restriction, and then, *in obvious response to the state court's judgment*, the exemption was eliminated. There is *no certainty that a similar course would not be pursued* if its most recent amendment were effective to defeat federal jurisdiction.

City of Mesquite, 453 U.S. at 289 (emphasis added). Clearly, the Court was concerned with acts committed in bad faith by the defendant in *City of Mesquite* — manifested not only by its history of repealing and reinstating constitutionally offensive language in an effort to frustrate judicial intervention, as noted above, but its "announced . . . intention" to reenact the very provision challenged if the district court's judgment was vacated, *id.*, 455 U.S. at 289 n. 11 — and was determined to prevent the defendant from engaging further in this questionable conduct.

In the case at bar, there is no evidence or history to indicate that Jacksonville changed its law in an effort to thwart federal jurisdiction. Unlike Mesquite, Jacksonville did not merely delete some language from its law, but replaced that law. Certainly, there is nothing in Jacksonville's conduct to suggest that if this case is dismissed as moot that it will reenact its old MBE program. And it cannot be ignored that unlike the defendant in *City of Mesquite*, Jacksonville changed its law *after* receiving a *favorable* judicial decision.

Moreover, the Court in *City of Mesquite* framed the mootness inquiry as follows:

> A question of mootness is raised by the revision of the ordinance that became effective while the case was pending in the Court of Appeals. When that court decided that the term "connections with criminal elements" was unconstitutionally vague,

> that language was no longer a part of the ordinance. Arguably, if the court had been fully advised, it would have regarded the vagueness issue as moot. It is clear to us, however, that it was under no duty to do so.

City of Mesquite, 555 U.S. at 288. The Court's choice of language seems to indicate that while the court of appeals had no duty to declare the case moot, neither was it prohibited from doing so. Thus, because of the specific circumstances of *City of Mesquite* and the fact that it was decided so closely on the heels of *Princeton*, it is unlikely that the Court in *City of Mesquite* was repudiating the holding or logic of *Princeton* as a general proposition of law. Indeed, if the rule in *City of Mesquite* was subject to universal application, the Court in *Croson* undoubtedly would have relied on it, rather than explaining that *Croson* was not moot because of the remaining issue of damages.

Although the Eleventh Circuit based its decision on Petitioner's lack of standing rather than mootness, it nevertheless dismissed the case without prejudice which, under the current circumstances, was the correct result. This Court may, therefore, affirm the judgment of the court of appeals. *See Board of Airport Commissioners of the City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 572 (1987) ("We granted certiorari . . . and now affirm, but on different grounds.").

B. At The Very Least, The Judgment Should Be Vacated And The Case Remanded For Additional Proceedings.

Of course, rather than dismissing the case on grounds of mootness, this Court could vacate the judgment and remand the case to permit Petitioner, if it so chooses, to amend its complaint in order to mount a challenge to the new Jacksonville ordinances. This was the approach selected by the Court in *Fusari v. Steinberg*, 419 U.S. 379 (1975).

Fusari involved a Connecticut law that underwent major revisions between the time the Court noted probable jurisdiction and the time allotted for briefing on the merits. Because of these revisions, the Court concluded that it was "unable meaningfully to assess the issues in this appeal on the present record." *Fusari*, 419 U.S. at 387. Rather than declaring the case moot, the Court vacated the judgment below and "remanded for reconsideration in light of the intervening changes in Connecticut law." *Id.* at 390.

The Court followed a similar course in *Diffenderfer v. Central Baptist Church*, 404 U.S. 412 (1972) (per curiam). In *Diffenderfer*, the plaintiff challenged on First Amendment grounds a Florida statute which exempted completely from state taxation a church-owned parking lot utilized for both church and commercial purposes. A three-judge district court upheld the statute and an appeal was taken. By the time the dispute reached the Court, however, the Florida statute involved had been repealed and replaced with different legislation.

On review, the Court, as an initial matter, noted that it "must review the judgment of the District Court in light of Florida law as it now stands, not as it stood when the judgment below was entered." *Diffenderfer*, 409 U.S. at 414. Next, the Court concluded that the case was not one "capable of repetition, yet evading review . . . , nor is it the kind of case that may produce irreparable injury if not decided immediately," *id*, because

> the only relief sought in the complaint was a declaratory judgment that the now repealed Fla. Stat. § 192.06(4) is unconstitutional as applied to a church parking lot used for commercial purposes and an injunction against its application to said lot. This relief is, of course, inappropriate now that the statute has been repealed.

Diffenderfer, 409 U.S. at 414-15. Rather than dismissing this case as moot, pursuant to *Munsingwear*, the Court, "[b]ecause it is possible that appellants may wish to amend their complaint so as to demonstrate that the repealed statute retains some continuing force or to attack the newly enacted legislation," vacated the judgment and remanded "with leave to the appellants to amend their pleadings." *Diffenderfer*, 404 U.S. at 415.

Regardless of whether this case is dismissed on grounds of mootness, as in *Munsingwear* and *Princeton*, or the judgment is vacated and remanded with additional instructions, as in *Fusari* and *Diffenderfer*, the point is that the case is not in the proper posture for this Court to review. In short, no purpose is served by determining whether Petitioner has standing to challenge a legislative scheme that no longer exists.

Moreover, this Court should not be placed in the position of having to evaluate, for purposes of establishing Petitioner's standing to sue, the relevant differences between the old and new law, not as a court of ultimate review, but as a court of original jurisdiction. That is exactly the role this Court will be forced to play, however, if it attempts to determine on the record before it whether or not Petitioner has standing to challenge the new Jacksonville MBE program.

Neither the district court nor the court of appeals has had an opportunity to evaluate Petitioner's standing under the current Jacksonville law. This Court should give those courts the opportunity to perform their traditional role, while at the same time, relieving itself of the obligation of doing the lower courts' work for them.

II. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT PETITIONER LACKS STANDING TO CHALLENGE JACKSONVILLE'S MBE PROGRAM

If this Court determines, however, that it is appropriate to address the standing question, it must, as a preliminary matter, heed a previously discussed rule from *Diffenderfer:* "This Court must review the judgment of the [court below] in light of [Jacksonville] law as it now stands, not as it stood

when the judgment was entered." *Id.*, 404 U.S. at 414. This means the new Jacksonville ordinances, not the repealed versions, must provide the framework for this Court's decision.

A. MBE Programs Are Important Tools For Eradicating Documented Discrimination. An Associational Plaintiff Must, Therefore, Plead Sufficient Facts To Demonstrate Its Standing To Sue.

States and municipalities are authorized to "eradicate racial discrimination and its effects in both the public and private sectors, and the absolute duty to do so where those wrongs were caused intentionally by the [government] itself." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 518 (1989) (Kennedy, J., concurring). Toward that end, government at all levels has a compelling interest in "assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." *Croson*, 488 U.S. at 492.

In order to further this compelling interest, a state or municipality, provided it can demonstrate the existence of prior discrimination, may develop remedial procedures in respect to the award of public contracts, including the institution of MBE programs. *See id.* at 504. MBE programs by their nature, are designed to facilitate the award of government contracts to minority businesses. Businesses operated by individuals who are not "minorities" within the meaning of the MBE statutory scheme, therefore, will be excluded to some extent from participating in the MBE program.

Because MBE programs can serve as useful weapons in any state or municipality's arsenal for eliminating discrimination, any challenge to their constitutionality must unmistakably satisfy the "case or controversy" requirements of Article III. This is particularly true when the party raising the constitutional challenge is an association that has

suffered no injury itself and sues merely in a representative capacity.

As a result, in order for such an association to demonstrate it has standing to challenge the constitutionality of an MBE program, it must recite in its complaint more than the obvious — that unidentified non-minority members of the organization have been or may be precluded from competing for equally unidentified government contracts because of the operation of the MBE legislation — and must, at a minimum, identify in its complaint particular contracts that specific members were prohibited from competing for because of the requirements of the MBE program. *See Warth v. Seldin*, 422 U.S. 490, 516 (1975) ("complaint refers to no specific project of any of [association's] members that is currently precluded . . . ") ; *see also Lujan v. Defenders of Wildlife*, ___ U.S. ___ , 112 S.Ct. 2130, 2138 (1992) (" 'some day' intentions . . . [of association's members] without any description of concrete plans" not enough to establish standing). A less demanding pleading requirement will serve only to justify purely speculative allegations concerning predicted conduct of unspecified association members, expose MBE programs to frivolous lawsuits, and strain the legal resources of states and political subdivisions.

B. The Judgment Below Was Mandated By This Court's Prior Cases On Standing.

Amici States agree with Petitioner that the Eleventh Circuit's position regarding standing is too restrictive. In the appellate court's defense, however, it may well be that it was troubled by Petitioner's "bare-bones" complaint, a complaint that did nothing more than describe the purpose and effect of many MBE programs.

Nevertheless, we agree that the court of appeals' reliance on a test predicating standing on an ability to demonstrate that but for the MBE program, one of Petitioner's non-minority members would have been awarded a specific contract, is not supported by the Court's cases discussing standing. *See,*

e.g., University of California Regents v. Bakke, 438 U.S. 265 (1978), and *Village of Arlington Heights v. Metropolitan Housing Development Corporation,* 429 U.S. 252 (1977). Consistent with those cases, the proper standard for evaluating Petitioner's standing is interference with a specific member's right "to compete." *Bakke,* 438 U.S. at 280 n.14. There is no requirement that a plaintiff demonstrate that the only impediment to the award of a particular contract was the existence of an MBE program. *See id.*

It does not follow, however, that the judgment below should be reversed. It still must be asked what allegations are sufficient to demonstrate Petitioner has standing to sue within the context of this specific controversy:

> Determining standing in a particular case may be facilitated by clarifying principles or even clear rules developed in prior cases. Typically, however, the standing inquiry requires careful judicial examination of a complaint's allegations to determine whether the particular plaintiff is entitled to an adjudication of the particular claims asserted.

Allen v. Wright, 468 U. S. 737, 753 (1984).

Often "the standing question can be answered chiefly by comparing the allegations of the particular complaint to those made in prior standing cases." *Id.* at 751 (citations omitted). An excellent basis for comparison to the complaint in this case is the complaint in *Warth v. Seldin,* 422 U.S. 490 (1975), a case that addressed directly the standing of an association.

In *Warth,* the petitioners sought declaratory and injunctive relief and damages from the town of Penfield, New York, claiming the town's zoning ordinance, on its face and as applied, prevented the construction of low-and-moderate income housing. The district court dismissed the complaint and denied motions to intervene filed by two associations. The Second Circuit affirmed on the ground that none of the plaintiffs or the applicants to intervene had standing. This Court also affirmed on the basis of lack of standing.

One of the intevernors, Rochester Home Builders Association, "an association of firms engaged in residential construction," 422 U.S. at 497, claimed the allegedly discriminatory zoning ordinance "arbitrarily and capriciously prevented its member firms from building low-and-moderate-cost housing in Penfield, and thereby . . . deprived them of potential profits." 422 U.S. at 492. The Court, after rejecting Home Builders' claim for damages, turned its attention to the association's request for declaratory judgment and injunctive relief and noted the following:

> Home Builders' prayer for prospective relief fails for a different reason . . . . The complaint refers to no specific project of any of its members that is currently precluded either by the ordinance or by respondents' action in enforcing it. There is no averment that any member has applied to respondents for a building permit or a variance with respect to any current project. Indeed, there is no indication that respondents have delayed or thwarted any project currently proposed by Home Builders' members, or that any of its members has taken advantage of the remedial processes available under the ordinance. In short, insofar as the complaint seeks prospective relief, Home Builders has failed to show the existence of any injury to its members of sufficient immediacy and ripeness to warrant judicial intervention.

Warth, 422 U.S. at 516.

The Court's analysis in *Warth* easily can be applied to the case at bar. Petitioner's complaint "refers to no specific project" upon which any of its members have been prevented from bidding because it was set aside exclusively for minority businesses. Petitioner's complaint also fails to identify any bid submitted and rejected for consideration because of the requirements of Jacksonville's MBE program. And, Petitioner's complaint does not contain an allegation that any of its members submitted bids for a specific project and attempted unsuccessfully to qualify under any available

exception to the application of the law. Petitioner did plead that "numerous non-minority members of Plaintiff have been deprived of substantial economic and business opportunities," but that is no more sufficient to establish standing than it was for Home Builders to plead in its complaint in *Warth* that its members were "deprived of potential profits."

The seminal *Bakke* case provides another good comparison. In *Bakke*, a white applicant for admission to the University of California at Davis's medical school challenged the medical school's special admissions program for minorities. The program reserved sixteen of the 100 available seats in the first year class for minority students whose academic credentials did not satisfy the usual admission requirements. Bakke, who failed to secure admission through the traditional admissions process, had academic qualifications superior to those required of candidates for the special admissions program.

Although standing was not the focus of the Court's inquiry in *Bakke*, it nevertheless was addressed. According to the Court, Bakke's standing was not dependent on his ability to "prove that he would have been admitted in the absence of the special program." *Bakke*, 438 U.S. at 281 n.14. Instead, Bakke was injured by "the University's decision not to permit him to compete for all 100 places in class, simply because of his race." *Id.*

It is instructive to examine Bakke's complaint to identify the steps Bakke took in his own behalf and the conduct of the University that placed him in position to sue. First, Bakke selected a specific medical school to which he sought admission. Second, he then actually applied for admission. This, of course, required him to complete all necessary paperwork and submit it for consideration. Finally, his application for admission was rejected. Thus, while Bakke was not required to demonstrate that his exclusion from medical school was a direct result of the operation of the special admissions program, he actually had applied for admission prior to complaining that the special admissions

program prohibited him and others like him from being considered for admission.

In stark contrast stands the complaint of Petitioner. It does not identify a specific member or members who have been denied the opportunity to compete. It does not identify any paticular contract of interest to any of its members. It does not indicate that any of its members submitted bids for any of the projects subject to Jacksonville's MBE law. And, in light of the changes in Jacksonville's MBE program, it does not plead with any particularity whatsoever how the new law, on its face, precludes any of its members from submitting bids and competing for particular projects. In short, Petitioner's complaint is bereft of any of the allegations or reference to the circumstances that distinguished the complaint in *Bakke*.

The Court's wisdom expressed in *Allen*, that a dispute over standing can best be resolved by comparing complaints from earlier standing cases to the complaint at issue, is compelling here. Indeed, when compared to the complaints in *Warth* and *Bakke*, Petitioner's complaint is woefully inadequate and fails to establish standing under either the old or new Jacksonville legislative scheme. Petitioner's complaint resembles the flawed complaint submitted by Home Builders in *Warth* much more than it resembles the complaint in *Bakke*. Under the circumstances, it deserves to suffer the same fate as Home Builders' complaint.

C. The Formulation For Standing Offered By Amici States Ohio And Michigan Best Serves Public Policy.

Three competing rules for establishing standing have been presented for this Court's consideration — the rule forming the basis of the Eleventh Circuit's decision, the rule proposed by Petitioner, and the rule that Amici States urge this Court to adopt. Of the three, only the last, as discussed above, comports with this Court's precedents. Only the last strikes the proper balance between assuring litigants that the doors to the courthouse will remain open and removing those doors

from their hinges.

On one hand, the Eleventh Circuit's rule is unduly restrictive. Its adoption by this Court will place a severe burden on any associational plaintiff seeking to vindicate its members' rights to equal opportunity.

On the other hand, judgment for Petitioner will dramatically reduce the effectiveness of a motion to dismiss as a mechanism for challenging the standing of an association acting in nothing more than a representative capacity. The association will be under no obligation whatsoever, prior to initiating suit, to obtain the sort of information concerning its members' business relations with a government entity that is within its, or its members', possession. Petitioner's rule also will encourage such an association to initiate suit attacking significant social legislation without first establishing that any of its members have been injured in a particularized fashion sufficient to invoke federal jurisdiction and present a federal court with a concrete case or controversy. *See Defenders of Wildlife*, 112 S.Ct. at 2138 (association's members must establish "continuing, present adverse effects" in order to obtain injunctive relief) (citations omitted).

If MBE programs are to function as intended, designating a small percentage of government contracts for minority businesses in order to remedy past discrimination, it goes without saying that non-minority contractors may be ineligible for those contracts. And while government should never be permitted, without justification, to exclude non-minority contractors from the competition for public contracts, neither should the importance of MBE programs be slighted by permitting Petitioner to proceed under the improper and relaxed standing requirements it proposes.

CONCLUSION

The judgment of the Eleventh Circuit should be affirmed or, in the alternative, the judgment should be vacated and the case remanded with instructions to permit Petitioner to amend its complaint.

Respectfully submitted,

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January 1993

Filed Jun 20 1974

Laurence P. Henigan, Clerk

By William Franas Deputy

In the Superior Court of the State of California,
In and for the County of Yolo

No. 31287

COMPLAINT FOR MANDATORY, INJUNCTIVE, AND DECLARATORY RELIEF

Allan Bakke,
Petitioner and Plaintiff,

-vs.-

The Regents of the University of California,
Defendants and Respondents.

FIRST CAUSE OF ACTION

Petitioner and plaintiff ALLAN BAKKE (hereinafter called plaintiff) alleges for a first cause of action:

I.

That plaintiff is a citizen of the State of California and of the United States of America.

II.

That defendants and respondents The Regents of the University of California (hereinafter called defendants) are public officers of the State of California, maintaining, operating and administrating the School of Medicine, University of California, Davis, Yolo County, California (hereinafter called said Medical School); that said Medical School is supported by public funds and tax monies and

receives federal financial assistance.

III.

That plaintiff duly and timely filed his applications with said Medical School for admission to the first-year classes of said Medical School commencing in September, 1973, and September 1974; that in each year, respectively, plaintiff received notification from said Medical School that his applications were denied.

IV.

That plaintiff was and is in all respects duly qualified for admission to said Medical School and the sole reason his applications were rejected was on account of his race, to-wit, Caucasian or white, and not for reasons applicable to persons of every race, as follows:

That a special admissions committee composed of racial minority members evaluated applications of a special group of persons purportedly from economic and educationally disadvantaged backgrounds; that from this group a quota of 16%, or 16 out of 100 first-year class members, was selected; that in fact, all applicants admitted to said Medical School as members of this group were members of racial minorities; that under this admission program racial minority and majority applicants went through separate segregated admission procedures with separate standards for admissions; that the use of such separate standards resulted in the admission of minority applicants less qualified than plaintiff and other non-minority applicants who were therefore rejected.

V.

That by reason of the action of defendants in excluding plaintiff from the first-year Medical School class under defendants' minority preference admission program, plaintiff has been invidiously discriminated against on account of his race in violation of the Equal Protection Clause of the

Fourteenth Amendment to the United States Constitution, the Privileges and Immunities Clause of the California Constitution (Art. 1, sec. 21), and the Federal Civil Rights Act (42 U.S.C. sec. 200(d).).

VI.

That plaintiff has no plain, speedy or adequate remedy at law.

SECOND CAUSE OF ACTION

Plaintiff alleges for a second cause of action:

I.

Plaintiff realleges and incorporates herein by reference each and every allegation contained in Paragraphs I through VI of his first cause of action set forth above.

II.

That plaintiff will suffer substantial and irreparable harm by reason of the continued refusal of defendants to admit him to said Medical School.

THIRD CAUSE OF ACTION

Plaintiff alleges for a third cause of action:

I.

Plaintiff realleges and incorporates herein by reference each and every allegation contained in Paragraphs I through VI of his first cause of action set forth above.

II.

That a bonafide and genuine dispute exists between Plaintiff, on the one hand, and, defendants, on the other hand, as to plaintiff's right to be admitted to said Medical

School.

WHEREFORE, plaintiff prays:

1. That this Court issue its alternate writ of mandate directing defendants to admit plaintiff to said Medical School, or to appear before the above entitled Court and show cause why said admission to said Medical School may be denied plaintiff.

2. That the above entitled Court issue its order directing defendants to appear and show cause why they should not be enjoined during the pendency of this action and permanently from denying plaintiff admission to said Medical School.

3. That this Court enter its judgment declaring that plaintiff is entitled to admission to said Medical School; and, further declaring, that defendants are lawfully obligated to admit plaintiff to said Medical School.

4. For such other and further relief as to this Court may seem proper.

JACOBS, BLANKENBURG, MAY & COLVIN

By Reynold H. Colvin
Attorneys for Plaintiff

No. 91-1721

Supreme Court, U.S.
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OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

NORTHEASTERN FLORIDA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA,
Petitioner,

v.

CITY OF JACKSONVILLE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF OF THE NATIONAL LEAGUE OF CITIES, NATIONAL GOVERNORS' ASSOCIATION, U.S. CONFERENCE OF MAYORS, NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, AND NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether an association has satisfied the injury in fact element of standing for purposes of challenging a set-aside ordinance where it has failed to allege that one or more of its members have been or will be deprived of particular bidding opportunities for which they would otherwise be eligible.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICI CURIAE*	1
STATEMENT OF THE CASE	2
A. The Ordinance at Issue	2
B. History of the Case	5
SUMMARY OF ARGUMENT	6
ARGUMENT	8
PETITIONER HAS FAILED TO SATISFY THE INJURY IN FACT ELEMENT NECESSARY TO ESTABLISH STANDING	8
A. Injury in Fact Is a Constitutional Prerequisite to Suit	8
B. Petitioner Has Failed to Allege That Its Members Suffered Injury in Fact	13
1. The Injury Alleged By Petitioner Is Not One Which Is Judicially Cognizable Given the Parameters Set Forth in *Croson*	13
2. Petitioner's Alleged Injury Is Too Speculative To Confer Standing	16
3. Because Petitioner Has Not Demonstrated Injury in Fact in Either the Qualitative or Temporal Sense, It Must Be Denied Standing	19
CONCLUSION	20

TABLE OF AUTHORITIES

CASES: Page

Allen v. Wright, 468 U.S. 737 (1984) ..... *passim*
City of Los Angeles v. Lyons, 461 U.S. 95 (1983) .. 9, 10, 16
City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989) ..... *passim*
Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978) 9
Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979) 13
Heckler v. Mathews, 465 U.S. 728 (1984) 12
Linda R.S. v. Richard D., 410 U.S. 614 (1973) 14
Lujan v. Defenders of Wildlife, 112 S.Ct. 2130 (1992) ..... *passim*
Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) .. 10
O'Shea v. Littleton, 414 U.S. 488 (1974) 10, 11, 16, 17
Regents of the University of California v. Bakke, 438 U.S. 265 (1978) 12, 14
Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974) 2, 9, 16
Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26 (1976) 9
Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982) 7, 9, 13
Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) 9
Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) 16
Warth v. Seldin, 422 U.S. 490 (1975) 8, 13
Whitmore v. Arkansas, 495 U.S. 149 (1990) ..... *passim*

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES:

Fed. R. Civ. P. 8 16
Jacksonville Purchasing Code, § 126.601 *et seq.* 3, 4

OTHER AUTHORITIES:

Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U.L. Rev. 881 (1983) 9

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a vital interest in legal issues that affect the powers, responsibilities, and liabilities of state and local governments.

Petitioner seeks to challenge a city program without even attempting to satisfy the first requirement of standing—the allegation of an "injury in fact." Under this Court's cases, a plaintiff must, in order to establish standing, allege a concrete and particularized injury that is actual or imminent. The unacceptable alternative, as this case graphically illustrates, is to transform the federal courts into forums for airing " 'generalized grievances' about the conduct of Government." *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 217 (1974) (citation omitted). The result, of course, would be the subversion of the structure and functioning of government.

State and local governments should not be subjected to such victimless, political litigation. Litigation brought in the absence of identified injury diverts funds from already strapped state and local budgets, and entangles state and local governments and the courts in adjudication of political disputes brought by advocacy groups. Such challenges may concern a wide variety of highly charged substantive issues, as is indicated by the array of *amici* supporting petitioner.

Because of the importance of the issues presented to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.[1]

STATEMENT OF THE CASE

A. The Ordinance at Issue

At issue in this case is the standing of AGC to challenge, on equal protection grounds, the City of Jacksonville's Minority Business Enterprise Participation Programs. City of Jacksonville, Fla. Purchasing Code §§ 126.601-126.611 (1984), Pet. App. 14-27 ("the ordinance").[2]

[1] The parties' letters of consent, pursuant to Rule 37 of the Rules of the Court, have been filed with the Clerk.

The ordinance earmarked 10% of City contracting funds for minority owned business ("MBE") contracting opportunities. City Code § 126.604(a), Pet. App. 15-16. It did not, however, automatically "set aside" any specific number or percentage of municipal contracts for MBE bidding only. Instead, the ordinance set up a discretionary framework for achieving its goals. The ordinance directed the Chief Purchasing Officer ("CPO") of the City, in consultation with the Director of Public Works and representatives of each division of City government, to ascertain annually what amounts of money were to be spent under the ordinance. City Code § 126.604(b), Pet. App. 17. Once the dollar amount of the set-aside was determined, the CPO and other government officials were required to determine which projects were reserved for MBE's. They were directed to "endeavor to include projects representative of the total number of projects which will be constructed or undertaken and the types of trades which will be utilized durng the fiscal year." City Code § 126.604 (b)(1), Pet. App. 17.

The ordinance provided that, throughout this process, "mathematical certainty is not required", City Code § 126.605(a)(4), Pet. App. 19, and specifically allowed the CPO to 'waive the percentage set-aside . . . or reduce the percentage to a definite amount less than

[2] On October 27, 1992, the ordinance was repealed. *See* Respondents' Motion to Dismiss at 2-3.

the ten percent" based upon consideration of the following factors:

> (a) the total dollar amount of the proposed set aside;
>
> (b) the extent to which the type or types of contracts involved may be reasonably susceptible to separate contracting of portions of work, services, goods, supplies and the like;
>
> (c) the particular type or types of work, services, goods, supplies and the like which are involved in the set aside;
>
> (d) the availability of minority business enterprises in the particular contracting specialties, areas or fields involved in the set aside; and
>
> (e) the additional cost to the City of securing the specified percentage of minority business enterprise participation.

City Code § 126.608, Pet. App. 24.

If projects were exempted on any of the foregoing bases, the dollar amount was *subtracted* from the overall goal. *Id.* Hence, petitioner admits that under the ordinance, "depending upon the availability of minority businesses[,] the percentage of set-aside work for MBE's can vary from 0% to 10%." R., docket entry 10/20/89, Plaintiff's Statement of Material Facts As To Which There Exists No Genuine Issue ¶ 24 at p. 8.

Both the amount of the set-aside, and the listing of specific contracts, were subject to review and revision by the Mayor. Changes occurring in the set-aside program during the fiscal year had to be reported to the CPO on a quarterly basis, and alterations had to be approved by the Mayor. City Code § 126.610, Pet. App. 25.

B. History of the Case

Petitioner brought an action for injunctive relief under 42 U.S.C. § 1983. Petitioner's allegations of harm included the following:

> 46. Numerous non-minority members of Plaintiff AGC would have been eligible to, and would have, bid on such designated set aside contracts but for the restrictions imposed on such contracts by the Defendants . . . .
>
> 48. Numerous non-minority members of Plaintiff have been damaged economically by being required to discriminate in the award of subcontracts so as to satisfy the 10% minority participation requirement.
>
> 49. Numerous non-minority members of Plaintiff AGC have been damaged by such actions of the Defendants because they have ben [sic] deprived of substantial economic and business opportunities by being precluded from bidding on and performing subcontracts for persons holding construction contracts who have been required to award such subcontracts to MBE's.

J.A. 18-19.[3]

The district court issued a preliminary injunction against the operation of the ordinance. J.A. 35. The court of appeals reversed because of AGC's failure to demonstrate irreparable injury. J.A. 40. In support of its holding, the court of appeals expressly noted

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[3] While AGC's complaint alleged that "all contractors awarded City . . . construction contracts must subcontract at least ten percent (10%) of such contracts to MBEs," J.A. 19, the sole provision of the ordinance dealing with subcontracting applies only to "[a] minority business enterprise that is awarded a contract under this part." Pet. App. 23.

that "[t]he plaintiff association failed to bring forth representatives who could assert injury from the set-aside program." J.A. 39. Concurring specially, Chief Judge Tjoflat likewise concluded that "plaintiff did not fulfill its responsibility of establishing the standing of its individual members and therefore lacks representative standing to litigate its members' claims." J.A. 42-43. (Tjoflat, C.J., concurring).

On remand petitioner "filed no additional material but relied upon the record that had been presented . . . on appeal." J.A. 2. The district court granted AGC's motion for summary judgment and entered a permanent injunction against the City.

The court of appeals reversed, holding that petitioner lacked standing. The court reasoned that petitioner's allegations were insufficient to satisfy the constitutional requirement of injury in fact to one of its members. Pet. App. 5.

SUMMARY OF ARGUMENT

1. To give effect to Article III's limitation of the federal judicial power to actual cases and controversies, a plaintiff invoking the jurisdiction of the federal courts bears the burden of establishing its standing to sue, that is, "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984). This case centers on whether petitioner has established the "injury in fact" element of standing. As the Court has repeatedly emphasized, that injury "must be concrete in both a qualitative and temporal sense." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). Accordingly, the injury must be "concrete and particularized," *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, 2136 (1992), and not "merely 'abstract.'" *Whitmore*, 495 U.S. at 155 (citation omitted). Moreover, the "alleged harm must be actual or imminent, not 'conjectural' or 'hypothetical.'" *Id.* (citation omitted).

2. Petitioner's allegations of injury are deficient in both respects. In the qualitative sense, petitioner's broad based challenge to Jacksonville's set-aside ordinance lacks the specificity necessary for a federal court to ensure that it is not invalidating Jacksonville's set-aside program in the absence of any injury. Moreover, this Court's decision in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), did not create a *per se* rule that racial or gender based set-asides violate the Equal Protection Clause. To the contrary, Jacksonville can adopt a set-aside program so long as it is narrowly tailored to redress identified discrimination. 488 U.S. at 509. Because Jacksonville's ordinance covers numerous trades, even if the ordinance were unconstitutional with respect to one trade, it might be constitutional when applied to other trades. The failure of petitioner to identify with particularity the trades its members engage in, let alone the specific bidding opportunities which were set aside within those trades, thus leaves the federal courts without "a realistic appreciation of the consequences of judicial action." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

3. Petitioner's allegations of injury are also deficient because the alleged harm is too " 'conjectural' or 'hypothetical.'" *Whitmore*, 495 U.S. at 155 (cita-

tions omitted). As the Court has recognized, petitioner's injury must be either "actual or imminent," *id.* at 155; "[a]llegations of possible future injury do not satisfy the requirements of Art. III." *Id.* at 158. Petitioner points to no situation in which any member was denied a bidding opportunity on account of race or sex. Indeed, petitioner has failed to allege any instance in which the city's officials have stated their intention to set aside any contract that would deprive a member of a bidding opportunity within that member's particular trade. The Court should thus decline petitioner's invitation to enter " 'into the area of speculation and conjecture' . . . and [go] beyond the bounds of its jurisdiction." *Id.* (citation omitted).

ARGUMENT

PETITIONER HAS FAILED TO SATISFY THE INJURY IN FACT ELEMENT NECESSARY TO ESTABLISH STANDING

A. Injury in Fact Is a Constitutional Prerequisite to Suit

As the Court has repeatedly recognized, "Article III of the Constitution confines the federal courts to adjudicating actual 'cases' and 'controversies.' " *See, e.g., Allen v. Wright*, 468 U.S. 737, 750 (1984). This doctrine, "founded in concern about the proper—and properly limited—role of the courts in a democratic society," *Warth v. Seldin*, 422 U.S. 490, 498 (1975), states a "fundamental limit[] on federal judicial power in our system of government."[4] *Allen*, 468

[4] As the Court has recognized, "the law of Art. III standing is built on a single basic idea—the idea of separation of

U.S. at 750. Hence, Article III's limitation on the judicial power is "not merely a troublesome burden to be overcome if possible so as to reach the 'merits' of a lawsuit which a party desires to have adjudicated; it is part of the basic charter promulgated by the Framers of the Constitution." *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 476 (1982).[5] The federal courts simply do not exist to resolve every grievance a party may have with the operation of government. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983); *Schlesinger v. Reservists Committee To Stop The War*, 418 U.S. 208, 217 (1974).

A party thus may not pursue a grievance in the federal courts unless it establishes its standing to sue, that is, "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen*, 468 U.S. at 751. Moreover, it is the burden of the party invoking the jurisdiction of the federal courts to establish these elements. *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, 2136 (1992).

This case centers on whether petitioner's complaint establishes but one of the core elements of the standing inquiry, the "injury in fact" element. *See id.* "That injury," as the Court has "emphasized repeat-

powers." *Allen*, 468 U.S at 752. *See also* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U.L. Rev. 881 (1983).

[5] *See also Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 72 (1978); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 260-61 (1977); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976).

edly must be concrete in both a qualitative and temporal sense." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). In the qualitative sense, the injury must be "concrete and particularized," *Lujan*, 112 S.Ct. at 2136, and not "merely 'abstract.'" *Whitmore*, 495 U.S. at 155 (quoting *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974)). And in the temporal sense, the "alleged harm must be actual or imminent, not 'conjectural' or 'hypothetical.'" *Id.* (quoting *City of Los Angeles v. Lyons*, 461 U.S. at 101-02); *see also Lujan*, 112 S.Ct. at 2136.

The Court has steadfastly adhered to these principles in a variety of cases involving claims of racial discrimination. For example, in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), the plaintiff was an African American who was denied service by a club's dining room while attending as the guest of a member. Plaintiff challenged both the club's racially exclusionary membership policy and its failure to serve him under the Equal Protection Clause of the Fourteenth Amendment. The Court rejected plaintiff's challenge to the club's membership policy for lack of standing, holding that he "was not injured by Moose Lodge's membership policy since he never sought to become a member." 407 U.S. at 167. The Court held, however, that plaintiff had standing to challenge the club's failure to serve him. *Id.* at 168.

In *O'Shea v. Littleton*, 414 U.S. 488 (1974), a class largely comprised of African American civil rights workers alleged that various officials "'have denied and continue to deny to plaintiffs and members of their class their constitutional rights' by illegal bond-setting, sentencing, and jury-fee practices." 414 U.S. at 495. The Court dismissed the complaint, reasoning that because "the prospect of future injury

rests on the likelihood that respondents will again be arrested . . . and will again be subjected to bond proceedings, trial, or sentencing" before the defendant officials, the injury involved "speculation and conjecture." *Id.* at 496-97.

In *Allen*, parents of black public school students alleged that the Internal Revenue Service had failed to adopt adequate standards and procedures to enforce its policy of denying tax exempt status to racially discriminatory private schools. 468 U.S. at 740. The parents, however, did not allege that their children had been denied admission by any of the schools. *Id.* at 746. Indeed, as the Court noted, the parents never alleged "that their children have ever applied or would ever apply to any private school." *Id.* Instead, the parents alleged, *inter alia*, "a direct injury from the mere fact of the challenged Government conduct." *Id.*

The Court, despite interpreting the alleged injury as "a claim simply to have the Government avoid the violation of law alleged in respondent's complaint" and, alternatively, as "a claim of stigmatic injury, or denigration, suffered by all members of a racial group when the government discriminates on the basis of race," held both grounds insufficient to confer standing. 468 U.S. at 753-756. With regard to the first ground, the Court held that "an asserted right to have the Government act in accordance with law is not sufficient" to confer standing. *Id.* at 754. With regard to the second ground, the Court, while noting the seriousness of such stigmatic injuries, nevertheless rejected it as too abstract to be judicially cognizable because it was not "suffered as a direct result of having personally been denied equal treatment." *Id.* at 755-56.

These constitutional principles are not subject to modification or dilution where discrimination against a non-minority group is alleged. For example, *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), a case involving a non-minority plaintiff, contains reasoning wholly consistent with these well-settled principles of standing.

To be sure, petitioner is correct that the standards articulated in *Bakke* do not require it to allege that its members would have received a particular contract, but rather only that they have received unequal treatment. *See* Pet. Br. at 15-16, 25. *Bakke*, however, does not support petitioner's position that its complaint sufficiently alleges injury. In contrast to petitioner, Bakke's injury was distinct and palpable. Having applied to and been rejected by the university's medical school, Bakke had at least identified how he had been " 'personally denied equal treatment' by the challenged discriminatory conduct" and therefore had standing to challenge the medical school's admissions program. *Allen*, 468 U.S. at 753 (quoting *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984)). It is clear, however, that Bakke would not have had standing to mount a challenge to the minority admissions programs of those schools of the university to which he did not apply. *See Allen*, 468 U.S. at 746.

Petitioner mounts exactly the type of broad based challenge which this Court's clear precedents make untenable. Petitioner's complaint does not identify the particular trades its members engage in, or any particular contract its members would have bid on. *See* J.A. 10-11, 18-19. But as the Court recognized in *City of Richmond v. Croson*, 488 U.S. 469 (1989), construction contracts involve a variety of "particular service[s]."

Because petitioner's complaint fails to identify the particular trades its members engage in, let alone any bidding opportunities set aside within those trades, to hold that it has standing would result in needless litigation over the validity of the city's program when none of petitioner's members have been injured. And even if one of petitioner's members has been injured, there remains a very high possibility that portions of the city's program which do not injure any of petitioner's members will needlessly be subjected to judicial scrutiny. The failure of petitioner to identify with particularity the trades its members engage in or the bidding opportunities of which they were deprived thus leaves the federal courts without "a realistic appreciation of the consequences of judicial action." *Valley Forge*, 454 U.S. at 472. Absent this showing, petitioner has not sufficiently alleged an "actual or threatened injury" and the "exercise of federal jurisdiction 'would be gratuitous and thus inconsistent with the Art. III limitation.' " *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979) (citation omitted).

B. Petitioner Has Failed to Allege That Its Members Suffered Injury In Fact

1. *The Injury Alleged By Petitioner Is Not One Which Is Judicially Cognizable Given the Parameters Set Forth in* Croson

It is axiomatic that petitioner's injury must be to "a legally protected interest." *Lujan*, 112 S.Ct. at 2136. While "standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal, it often turns on the nature and source of the claim asserted." *Warth v. Seldin*, 422 U.S. 490, 500 (1975). As the Court has recognized, "[t]he actual or threatened injury required by Article III may exist solely by virtue of [the provi-

sion] 'creating legal rights.'" *Id.* (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973)). Accordingly, in order to determine whether petitioner has alleged an injury sufficient to confer standing, an examination of the nature and source of its claim is necessary.

A mere assertion of a classification based on race is insufficient, in itself, to confer standing. This Court has repeatedly declined to hold that the Constitution requires absolute color-blindness. *See, e.g., Bakke*, 438 U.S. at 355-56 ("the position that . . . '[o]ur Constitution is color-blind' has never been adopted by this Court as the proper meaning of the Equal Protection Clause"). In *Croson*, the Court provided specific guidance as to the nature of the legal interests implicated in the contract set-aside context.

In *Croson*, the Court addressed whether a municipal contracting ordinance violated the Equal Protection Clause of the Fourteenth Amendment because it set aside a percentage of the contracts for minority business enterprises (MBEs). While the Court invalidated the Richmond ordinance, it did not create a *per se* rule that racial or gender based set-asides are unconstitutional. As the plurality stated:

> Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction. If the city of Richmond has evidence before it that non-minority contractors were systematically excluding minority businesses from subcontracting opportunities it could take action to end the discriminatory exclusion. Where there is a significant statistical disparity between the number of qualified minority contractors *willing or able to perform a particular service* and the number of such contractors actually engaged by

> the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise. Under such circumstances, the city could act to dismantle the closed business system by taking appropriate measures against those who discriminate on the basis of race or other illegitimate criteria. In the extreme case, *some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion.*

Croson, 488 U.S. at 509 (citations omitted) (emphasis added). *Croson* thus makes clear two points significant in analyzing the nature of the injury which petitioner has alleged. First, a municipality may enact a set-aside provision so long as it is narrowly tailored and redresses identified discrimination. *Id.* The corollary of this proposition is that when a municipality satisfies *Croson*, the Equal Protection Clause has not been violated and a plaintiff cannot prove an injury of constitutional dimension. Accordingly, a plaintiff alleges injury only when it alleges that bidding opportunities in the particular trade it engages in have been restricted in violation of *Croson*. Second, while it may be that the application of the strict scrutiny required by *Croson* will frequently result in the invalidation of a set-aside ordinance, that cannot be used as an excuse to disregard the application of the same standing requirements imposed in other cases. Jacksonville's contracting ordinance covers numerous trades. While it may well be the case that the ordinance is unconstitutional as applied to a "particular service" (488 U.S. at 509) or trade such as bricklayers, it may also be the case that the ordinance, when applied to plumbers or electricians, for example, is constitutional.

In order to satisfy Article III's case or controversy requirement then, the Court must require a plain-

tiff challenging the program to allege which particular aspects of the program have caused it injury. The Court cannot allow a plaintiff to mount the type of hypothetical global challenge to every aspect of the program such as petitioner did here. *Cf. Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). Not only is such a challenge extremely burdensome to defend, it needlessly results in the socially divisive and destructive process of reexamining a locality's past history of racial discrimination. Here, in contrast to *Croson* where the contractor identified a particular service (and contract) subject to the set aside, *see* 488 U.S. at 481, petitioner provides no similar level of specificity but rather rests on a blanket allegation which fails to identify with particularity the trades its members engage in. And petitioner's complaint does not even give Jacksonville fair notice as to which aspects of its program it must defend. *See* Fed. R. Civ. P. 8. Petitioner's blanket allegations are not enough to transform this dispute from a " 'generalized grievance[]' about the conduct of Government," *Schlesinger*, 418 U.S. at 217, into a judicially cognizable case or controversy.

2. *Petitioner's Alleged Injury Is Too Speculative To Confer Standing*

Petitioner's injury must also be concrete in the "temporal sense." *See, e.g., Whitmore*, 495 U.S. at 155. In this sense, the "alleged harm must be actual or imminent, not 'conjectural' or 'hypothetical.' " *Id.* (quoting *Lyons*, 461 U.S. at 101-02); *see also Lujan*, 112 S.Ct. at 2136; *O'Shea*, 414 U.S. at 497.

In *Whitmore*, petitioner, a death row inmate, sought review of a death sentence imposed on Simmons, a fellow inmate. 495 U.S. at 156. Petitioner's allegation of injury was premised on the State's system of comparative review of death penalty cases; petitioner thus

alleged that he had "a direct and substantial interest in having the data base against which his crime is compared to be complete and to not be arbitrarily skewed by the omission of any capital case." *Id.* at 156 (citation omitted). Whitmore's theory was "that he might in the future obtain federal habeas corpus relief that would entitle him to a new trial. If, in that new trial, Whitmore [was] again convicted and sentenced to death, he would once more seek review of the sentence by the Supreme Court of Arkansas" and "that court would compare Whitmore's case with other capital cases to insure that the death penalty is not . . . arbitrarily applied." *Id.* at 156-57. Thus, according to Whitmore, he would be injured "because the heinous crimes committed by Simmons would not be included in the data base employed for Whitmore's comparative review." *Id.* at 157.

The Court held Whitmore's injury to be "too speculative to invoke the jurisdiction of an Art. III court." *Id.* Not only was it problematic whether Whitmore would ever receive habeas relief, it was "nothing more than conjecture that the addition of Simmons' crimes to a comparative review 'data base' would lead the Supreme Court of Arkansas to set aside" Whitmore's death sentence. *Id.* As the Court, after an extensive survey of its prior cases, concluded, "[a] threatened injury must be 'certainly impending' to constitute injury in fact." *Id.* at 158 (citations omitted). *See also O'Shea*, 414 U.S. at 497.

Just last term, the Court revisited in *Lujan* the issue of when an alleged injury is sufficiently imminent to confer standing. There, an environmental advocacy group challenged a regulation promulgated by the Secretary of the Interior under § 7 of the Endangered Species Act of 1973, 87 Stat. 884, 892.

112 S.Ct. at 2135. Plaintiff argued that the challenged regulation violated § 7 because it did not require federal agencies to ensure that actions undertaken in foreign countries did not threaten any endangered or threatened species. *Id.* at 2135. Its claim of injury rested on the affidavits of two members. The first affiant stated that "she traveled to Egypt in 1986 and 'observed the traditional habitat of the endangered Nile crocodile there and intend[ed] to do so again.' " *Id.* at 2138 (citation omitted). The second affiant stated that on a visit to Sri Lanka in 1981, she had observed the habitat of the Asian elephant and leopard and " 'intend[ed] to return to Sri Lanka in the future and hope[d] to be more fortunate in spotting at least the endangered elephant and leopard.' " *Id.* (citation omitted).

The Court held that these affidavits "plainly contain[ed] no facts . . . showing how damage to the species will produce 'imminent' injury." *Id.* As the Court reasoned, the affiants' " 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require." *Id.*

Petitioner's complaint suffers from the same fatal defect. Petitioner points to no situation in which any of its members sought and was denied a contract on account of race. Moreover, petitioner does not point to any instance in which the city's officials stated their intention to set aside any contract which would deprive a member of a bidding opportunity within that member's particular trade. Given the discretion which Jacksonville's ordinance vested in the city's officials to decide which, if any, contracts were to be set aside in a given year, as well as petitioner's total failure to identify a single instance in which one of its members had been or would be deprived of a bidding opportunity, petitioner's complaint fails to allege the " 'actual or imminent' injury that [the Court's] cases require." *Lujan*, 112 S.Ct. at 2138. *See also Whitmore*, 495 U.S. at 158 ("Allegations of possible future injury do not satisfy the requirements of Art. III."). The Court's longstanding precedents thus require that it decline petitioner's invitation to enter " 'into the area of speculation and conjecture' . . . and [go] beyond the bounds of [its] jurisdiction." *Id.*

3. *Because Petitioner Has Not Demonstrated Injury in Fact in Either the Qualitative or Temporal Sense, It Must Be Denied Standing*

In sum, petitioner's complaint in this case does not allege a concrete injury in either the qualitative or temporal sense. Petitioner does not allege a concrete past injury and its allegation of future injury rests on nothing more than the bald assertion that some unidentified members might not be awarded future unidentified contracts in the entirely speculative event that such contracts are set aside in the future. Such assertions cannot be sufficient to challenge Jacksonville's ordinance, particularly in the absence of any allegation that this program has ever been used to deny any contractor an equal opportunity to bid on a particular contract. It was, of course, petitioner's burden to make such allegations at the pleading stage. *Lujan*, 112 S.Ct. at 2136.

Amici do not suggest that, in order to establish its standing, petitioner is required to show that one of its members would have successfully bid on a particular contract. We do suggest, however, that ordinarily, the Court's precedents require a plaintiff challenging

a set-aside program to plead and prove that one of its members was qualified to bid on a particular contract and either bid or would have bid but for the set-aside program. Where, as here, that challenge arises in the context of a broad-based program susceptible to discretionary waivers and the like, the identification of a particular contract set aside within a contractor's particular trade is necessary to demonstrate injury in fact. Such a demonstration would satisfy the qualitative aspect of injury in fact by providing a concrete context within which to test the legal interest, as well as the temporal aspect by ensuring that harm is imminent rather than merely hypothetical.[6]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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[6] If, however, a set-aside program was narrowly tailored to operate only within a particular trade, required that a particular number or percentage of contracts be set aside, and allowed for no discretion in its administration, these aspects of injury in fact might be fulfilled by a demonstration that the plaintiff was a qualified contractor within that trade. Such a case is not, of course, presented here.